IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 560.

STATE OF NORTH CAROLINA, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees*.

Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF

for Appellants, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers' Association, Inc., and North Carolina Division of the Travelers' Protective Association of America, and B. F. Russell.

J. C. B. EHRINGHAUS
and
F. C. HELSLEY,
of Counsel for Appellants.

March, 1945.

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OPINIONS.

The opinion of the specially constituted District Court is reported in *State of North Carolina* v. *United States*, 56 F. Supp. 606 (Pr. 548).*

* Pr.—Printed Record in Supreme Court.

The Findings of the Interstate Commerce Commission as to Coach Fares in North Carolina are reported in *Alabama Intrastate Fares*, 258 I. C. C. 133 (Pr. 69).

JURISDICTION.

On November 13, 1944, the Supreme Court announced its finding that probable jurisdiction had been shown by the statement filed by appellants (Pr. 596).

This being a proceeding to enjoin, set aside or annul an order of the Interstate Commerce Commission, jurisdiction is conferred by Section 238 of the Judicial Code and by the Urgent Deficiencies Act, October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. A. 43-48.

STATEMENT OF THE CASE.

The North Carolina case.

In the Courts Below:

This case comes to the Supreme Court on appeal from an order of the United States District Court for the Eastern District of North Carolina, Raleigh Division, sitting as a specially constituted Three-Judge Court, hereinafter referred to as the District Court, under the provisions of the Urgent Deficiencies Act, 38 Stat. L. 219.

The State of North Carolina, the North Carolina Utilities Commission, the Charlotte Shippers and Manufacturers Association, Inc., the North Carolina Division of the Travelers' Protective Association of America (and B. F. Russell, its authorized representative) all hereinafter referred to for convenience as North Carolina, had petitioned the District Court to enjoin, set aside and annul an order of the Interstate Commerce Commission (Pr. 1).

The order (Pr. 507) of that Commission, hereinafter referred to as the federal Commission, prescribed and fixed increased fares for travel in railroad coaches in intrastate commerce in Kentucky, Tennessee and Alabama, and in

North Carolina, over the lines of certain railroads, in four consolidated proceedings reported in *Alabama Intrastate Fares,* 258 I. C. C. 133 (Pr. 69).

The District Court denied the injunction prayed for by North Carolina as to North Carolina intrastate coach fares, and the Decree (Pr. 545) of the District Court dismissed North Carolina's suit. *State of North Carolina* v. *United States,* 56 F. Supp. 606 (Pr. 548).

From that decision North Carolina appeals. No. 560 (Pr. 575).

The Kentucky case.

The orders of the federal Commission as to intrastate coach fares in Kentucky, Alabama and Tennessee were the subject of a similar suit in a like Court in the Western District of Kentucky.

The District Court in Kentucky dismissed the petitions of the States of Kentucky, Tennessee and Alabama to set aside the order of the federal Commission. An appeal has been taken by these three states. No. 574.

The Price Administrator's cases.

Fred M. Vinson, federal Economic Stabilization Director, by Chester Bowles, Price Administrator, hereinafter referred to as the Price Administrator, was a party by intervention to the proceedings before the Interstate Commerce Commission, protesting against any increases in the intrastate coach fares in North Carolina, Kentucky, Tennessee and Alabama. He was also a joint petitioner and complainant, and intervener, in the proceeding before the District Court in North Carolina (Pr. 37), and in the proceeding before the District Court in Kentucky, seeking to enjoin, set aside and annul the order of the federal Commission which required increases in the intrastate coach fares in the four respective states.

The Price Administrator has perfected two separate appeals, seeking to reverse the said orders of the District

Court in North Carolina and in the District Court in Kentucky as to the Kentucky, Tennessee and Alabama fares. His appeal, companion to North Carolina's appeal as to North Carolina fares, has been docketed in the October Term, 1944, as No. 561, and his appeal in the Kentucky Case is No. 592 (Pr. 585-587).

North Carolina has supported the position of the federal Price Administrator in the proceedings before the federal Commission and before the District Court in North Carolina.

The four appeals.

The subject-matter of the two appeals, in Nos. 560 and 561, as to North Carolina fares, is the same, although the Points to be Relied Upon by the Price Administrator differ from those to be relied upon by North Carolina.

The subject-matter of the appeal by Kentucky, Tennessee and Alabama No. 574 and of the appeal by the Price Administrator from the decision of the District Court for the Western District of Kentucky No. 592 as to the fares in those three respective states is substantially similar to the subject-matter in the Appeals, Nos. 560 and 561, from the decision of the District Court for the Eastern District of North Carolina.

The four appeals seek the injunction, setting aside and annulment of the orders of the federal Commission which were entered in conjunction with its findings and opinion in *Alabama Intrastate Fares*, 258 I. C. C. 133-134 (Pr. 69).

The fundamental theme of the four appeals is that the federal Commission's orders, requiring that the railroads increase their coach fares for intrastate travel in Kentucky, Tennessee, Alabama, and North Carolina, represent an unwarranted exertion of federal power over intrastate commerce within each of the four respective states.

THE STATUTORY PROVISIONS

under which the proceedings before the Interstate Commerce Commission arose.

The Interstate Commerce Commission on October 13, 1943, instituted four investigations (Pr. 141),

> "upon petitions by the rail carriers operating respectively, in Alabama, Kentucky, North Carolina and Tennessee, to determine whether the refusal of the regulatory authorities of those States to authorize or permit the application to the transportation of passengers traveling intrastate therein of fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce . . ."

(*Alabama Intrastate Fares,* 258 I. C. C. 133-134.)

The statutory provisions under which the four investigations were conducted and under which the orders were made by the federal Commission requiring increases in the intrastate coach fares in the four states of Kentucky, Tennessee, Alabama and North Carolina, are set forth in Section 13(4) of the Interstate Commerce Act (U. S. C. Title 49, Sec. 13(4)):

Section 13(4) is reproduced in Appendix A.

The federal Commission also gave consideration to the revenue needs of the railroads under the Rule of Ratemaking in Section 15a(2) of the Interstate Commerce Act. (U. S. Code, title 49, Sec. 15a(2) because of its dovetail relation to Section 13(4)).

Section 15a(2) is reproduced in Appendix A.

The federal Commission issued an order August 1, 1943 (Pr. 524), authorizing certain railroads to increase their

coach fares in the south, without any hearing, findings or report; and permitted tariffs to become effective October 1, 1942, without any hearing, findings or report even though protests and petitions for suspension had been filed, all without regard to the statutory requirement that the burden of proof to justify such increases shall be upon the carrier as provided in Section 15(7) of the Interstate Commerce Act.

Section 15(7) is reproduced in Appendix A.

Section 13(1) provides that complaints shall be brought by filing a petition with the Commission. Section 13(1) is reproduced in Appendix A.

Section 13(2) provides that the Commission shall investigate any complaint forwarded by the Railroad Commission of any state at the request of such Commission.

The same paragraph of Section 13 provides that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Portions of Section 13(2) are reproduced in Appendix A.

Section 15(1) provides that a full hearing shall be held by the Commission. A portion of Section 15(1) is reproduced in Appendix A.

Section 3(1) prohibits undue preference and advantage. Section 3(1) is reproduced in Appendix A.

CHRONOLOGICAL HISTORY OF THE COACH FARES

in the South and the proceedings relating thereto before the federal and state commissions.

1933-1937.

The 1936 Fares Case.

In *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, the federal Commission reported its findings in the first comprehensive and nationwide investigation which it had ever made of passenger fares for the several classes of passenger service by railroads (214 I. C. C. at page 175).

Separate findings of fact in elaborate detail were set forth in that 1936 Report with respect to fares for numerous types of passenger service such as coach fares, pullman fares, commutation fares and charges for travel in extra-fare trains, in the nation, in the southern region, and other districts respectively.

Separate findings of fact were set forth in detail in that 1936 Report with respect to the revenues per coach-mile and expenses per coach-mile; revenues per passenger mile in coaches and expenses per passenger mile in coaches; and average car-occupancy, as it affects the relation of coach revenues to expenses in the nation and in the several major districts.

No such comprehensive and analytical investigation of passenger fares for travel in coaches in the nation, in the southern region, or on the lines of particular southern railroads has been made or reported by the federal commission since that investigation, which was concluded in 1936.

The ultimate findings in the 1936 Fares Case.

The Findings in the *1936 Passenger Fare Case* were well summarized in the Report in *Alabama Intrastate Fares*, 258 I. C. C. 133 at page 135 (Pr. 72), as follows:

> "On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and *1.5 cents* per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5 cent fares maintained by other roads where competition made that necessary."
>
> "We prescribed (in the 1936 Fares Case) maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, *without prejudice to the maintenance of lower* fares in coaches or pullman cars. The pullman surcharge was found unreason-

able and its cancellation was required. The existing experimental fares in southern territory were *found not unreasonable or otherwise unlawful*" (258 I. C. C. at page 135). (Italics supplied.)

The experimental fares referred to therein included the coach fare of 1.5 cents per mile, which was in effect on most of the railroads in Southern territory. Attention is directed to the fact that, even in the four intrastate fares cases, decided March 25, 1944 (*Alabama Intrastate Fares*, 258 I. C. C. 133), the federal Commission expressly stated that it had found, in the *1936 Fares Case*, that the *1.5 cent coach fare in Southern territory was "NOT UNREASONABLE OR OTHERWISE UNLAWFUL"* (Pr. 72).

The ultimate findings of the federal Commission, in that *1936 Report* (214 I. C. C. 174), comprise the very groundwork and foundation for the intrastate coach fares which existed on many railroad lines when these Section 13 proceedings in the four Southern states were instituted by the federal Commission.

The ultimate findings in the *1936 Passenger Fare Case* (214 I. C. C. 174) that the coach fare of 1.5 cents per mile in the south was "*not unreasonable or otherwise unlawful,*" under the adverse economic conditions then existing, formed the principal foundation upon which the four state Commissions of Kentucky, Tennessee, Alabama and North Carolina relied in 1942 in denying the railroads' petitions to those commissions for authority to increase the intrastate coach fares under greatly changed conditions and over-prosperous financial conditions of the southern railroads.

And the findings in the *1936 Passenger Fare Case* (214 I. C. C. 174) were leaned heavily upon by the four states in the four proceedings before the federal Commission in resisting the exertion of federal power over these intrastate coach fares.

Again before the District Courts in Kentucky and in North Carolina, the four states leaned heavily upon the

findings in the *1936 Passenger Fare Case,* in seeking to enjoin, set aside and annul the orders of the federal Commission in *Alabama Intrastate Fares,* 258 I. C. C. 133.

Major findings in 1936 Fares Case.

To understand the full import of the findings in the *1936 Passenger Fares Case* it will be necessary to narrate and summarize the major findings of fact and concepts which formed the basis for the federal Commission's ultimate finding in the *1936 Fares Case* that the 1.5 cent fare in southern territory was "not unreasonable or otherwise unlawful".

The keynote, which resounds throughout the lengthy Report in the *1936 Fares Case,* is that the then existing deficiencies in passenger revenues were due to lack of passengers per train and per car, and lessened car-occupancy; that increasing the fares would produce, not increases, but reductions in revenue; and that the way to increase the net revenues so as to exceed expenses per car-mile or per passenger-mile was to *reduce* the fares; and that reduced fares would increase passenger travel and car-occupancy to such an extent that the unit expense per passenger-mile would be less than the reduced fare.

That keynote may sound strange to logic, but it was founded upon actual experience, and the Commission was careful to set forth in its Report much evidence which proved that, in actual practice, increased fares had reduced revenues, and that reduced fares had increased revenues, thereby reducing the unit expense per passenger mile.

Let us quote a few extracts from the Report in the *1936 Fares Case* to show the foundation for this view of the underlying basis which induced the Commission to reduce the basic fares in spite of the fact that such reduced fares would be substantially less than the then existing expenses per passenger-mile.

The Commission ordered a reduction in the maximum general basic fares to 2 cents per mile in coaches and 3 cents per mile in pullman cars, when the

> "expense per passenger-mile for all passenger cars is approximately 2.39 cents in the eastern district and 4.16 cents in the southern district",

in the year 1934 (214 I. C. C. at page 264 and 266).

In the year 1920, an increase of 20 per cent in fares which was permitted

> "not only failed to attain its purpose, but was attended by a substantial net loss in passenger revenue". (214 I. C. C. at page 176.)

The Commission found that for the year 1933 the

> "averages per passenger-mile thus arrived at are, for all passengers, 2.08 cents in revenue and 2.85 cents in expenses; for coaches, other than suburban, 1.88 cents (in revenue) and 2.73 cents (in expenses) respectively." (214 I. C. C. at page 180.)

The corresponding figures in Appendix I table 2, for the same year, 1933, in the southern district were 1.67 cents revenue per passenger mile and 3.25 cents expense per passenger mile in coaches other than suburban (214 I. C. C. at page 266).

In the 1936 Fares Case the Commission found that the southern railroads had been benefitted greatly by the coach fare of 1.5 cents; and the principal southern railroads strongly urged that that fare be continued and not disturbed.

In support of its judgment that reductions in the basic fares would increase car-occupancy and reduce unit expenses per passenger mile below the prescribed fare, the Commission dwelt at length in its Report in the *1936 Fares Case* upon the actual experience of the lines in the southern

territory with the coach fare of 1.5 cents per mile, and upon the necessity for a lower fare in the southern district than the reduced prescribed basic fare of 2 cents per mile in coaches in other sections of the country. To illustrate, bearing in mind that the railroads, whose fares are at issue in the North Carolina case, are the Atlantic Coast Line, the Louisville and Nashville (to a minor degree), the Seaboard Air Line Railway and the Southern Railway, the Commission said in the 1936 Fare Case, at page 188 that:

> "The approximate passenger-fare basis per mile now (then) in effect, throughout the South, (except on certain named lines) is 1.5 cents in coaches and 3 cents one way . . . in pullmans."
>
> "In March 1931 the Southern placed on sale round-trip tickets at 1 cent per mile, good on Sundays and in coaches only, between all stations on its system within a radius of 100 miles, later extended to 150 miles. This experiment immediately brought satisfactory returns and convinced this respondent that a fare sufficiently low would attract substantial traffic. (at page 189)
>
> "The Southern on September 15, 1932, established a one-way fare of 1.5 cents per mile, good in coaches only, between Winston-Salem and Goldsboro, N. C., and intermediate stations, and between Knoxville and Chattanooga, Tenn., and intermediate stations, the latter experiment being extended in the following February to and including Bristol, Tenn. This fare brought an immediate satisfactory response from the public. The first month of the experiment in North Carolina showed an increase over the corresponding month of the previous year of 223 per cent in passengers and 59 per cent in revenue, with an increase in train-miles of only 0.52 per cent". (page 190)
>
> "The Tennessee experiment was equally satisfactory. Commencing in the latter part of 1932, the 1.5 cent fare was extended over other portions of this respondent's (Southern Railway) lines, with similar successful results . . ." (page 190)
>
> "For example, between Asheville, Charlotte and Salisbury, N. C. and intermediate stations, it was established on January 15, 1933, and by October of that year

the number of tickets sold had increased above those for the corresponding months of 1932 from 2,949 to 16,257, or 451 per cent, the revenue had increased 166 per cent, and the additional train-miles operated by only 2.7 per cent. (page 190)

"The results from these experiments convinced this respondent that the fare of 1.5 cents should be given a trial over its entire system, and on December 1, 1933, that fare was so extended. (page 190)

"The Southern attributes this increase in its passenger revenue almost wholly to the stimulation in coach travel induced by the 1.5 cent fare." (page 191)

"This respondent (Southern Railway) *feels strongly* that in the southern district *any fare higher than 1.5 cents* in coaches will not attract volume traffic to the rails, but that, at such a fare, passenger traffic in coaches can be made profitable. It *asks* that its present fare basis (1.5 cents per passenger-mile in coaches) *be not disturbed*, and that no order be made against it in respect of passenger fares". (192)

The Commission then went on to relate, in detail, the similar experience of the Seaboard Air Line Railway (one of the principal respondents in the North Carolina Case); and the Commission said, as to the Seaboard, at page 194 that:

"These illustrations are sufficient to indicate the much more favorable results from the 1.5 cent than from the 2-cent experiment. The increase on the Seaboard, 1934 over 1933, was 68.6 per cent in number of passengers carried and 39.7 per cent in passenger revenues. Taken as a whole, the revenue results under the reduced fares on the Seaboard are as favorable as those on the Southern" . . . "The Seaboard is in accord with the Southern that the present fare basis (1.5 cent) throughout the South should be continued." (page 194)

"The experience of the Louisville and Nashville Railroad Company (also a respondent in the North Carolina Coach Fares Case) . . . in respect of its passenger traffic and revenues do not differ greatly from those of the Southern and the Seaboard."

The Commission, at pages 195 to 200 of its Report in the *1936 Fares Case*, considered the contention of the Atlantic Coast Line (another important respondent in the North Carolina Coach Fares Case) that

> "the present 1.5-cent fare in the southern district is too low". (at page 200)

And the Commission disposed of the Coast Line's contention that higher fares "would have drawn the same number of passengers as did the 1.5 cent fare" by saying:

> "The Coast Line, by its proposed future basis, concedes that the latter assumption cannot reasonably be made, and it would seem that the experience of the southern respondents generally, including that of the Coast Line, under the experimental fares definitely establishes that the former assumption is likewise fallacious". (at page 200)
>
> "The day when an increase in basic fare was quite certain to produce a corresponding increase in revenue is gone". (at page 200)

In stating its summary of the findings (at pages 253 to 256 of the Report) in the *1936 Fares Case* in prescribing 2 cents per passenger mile in coaches and 3 cents per passenger mile in pullmans, as the "general maximum fare basis", (page 255) the Commission said that:

> "There is doubt whether at least in the *southern district* a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any *higher* fare, and it may also be that round-trip fares on both coach and pullman traffic at a *lower* rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares. These matters are left to the discretion of respondents". (at page 255)

In stating its ultimate conclusions at page 256 of its Report in the *1936 Fares Case* that the general maximum

coach fare should be 2 cents per mile, the Commission expressly provided that this finding was

> "without prejudice to the maintenance of lower fares in coaches or in pullman cars, or both, in any one or more of the major districts of the country" . . .

(Pr. 72) and that

> "All outstanding section 13 orders affecting intrastate fares which are inconsistent with the conclusions herein reached will be modified so as to permit the bases prescribed or authorized herein to become effective or to continue in effect, as the case may be". (at page 257)

Throughout the Report in the *1936 Fares Case*, prominence is given by the Commission to its findings that coach travel in the south differs substantially from coach travel in other regions of the country; and the opinion is expressed in the Commission's conclusions that lower coach fares would produce better revenue results for the *southern* carriers than the general maximum basis of 2 cents per mile.

Later the Commission took occasion to justify its finding in the *1936 Fares Case* that reduced fares would increase travel and reduce the expense per passenger mile.

In the 1936 Fares Case and later cases, the Commission specifically recognized the necessity and the justification of the maintenance of the fare of 1.5 cent in the South in the interest of the southern carriers, on a lower basis than the general maximum prescribed fare of 2 cents for the Eastern and Western Districts.

In the Third Report in *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, decided February 12, 1940 the Commission said:

> "That higher fares do not necessarily produce more revenue is demonstrated by the results in the southern region under the increased 2-cent coach fare in 1938 as compared with the reduced 1.5-cent fare during 1937.

Excluding commutation, the results in coach revenue were $27,665,083, at an average per passenger mile of 1.48 cents in 1937, as compared with $22,071,383, or about 20 per cent less, at an average per passenger mile of 1.78 cents in 1938." (237 I. C. C. at page 276)

"On November 15, 1937, most of the southern roads increased their basic coach fare from 1.5 cents to 2 cents. As detailed in our third report, the results of that increased fare were disappointing, and on January 15, 1939, those roads restored the basic fare of 1.5 cents. On June 1, 1939, they established the round-trip coach fare of 1.35 cents." (237 I. C. C. at pages 272-273)

There the Commission stated the later facts as to coach travel in the south, since the *1936 Fares Case*, to justify the prediction, in the *1936 Fares Case*, that the fare of 1.5 cent in the South would result in increased travel, increased car occupancy, and reduced expenses per passenger mile.

There the Commission, in the Eastern Passenger Fare Case, was citing the success of the 1.5 cent fare in the South and the failure of a higher fare of 2 cents in the South from November 15, 1937, to January 15, 1939 as a reason why the Eastern railroads should not be permitted to publish their proposed increased fares in the Eastern district.

It was this successful experience of the southern railroads with the fare of 1.5 cents which prompted the Commission to find, in the Third Report in the *Eastern Case*, that

"The future net revenue results to the Eastern railroads will probably be more favorable under 2-cent than under a 2.5-cent basic coach fare in eastern territory". (237 I. C. C. at p. 286)

The Commisison denied the petition of the Eastern carriers for an extension of the 18 months' period, permitted in the Second Report in the Eastern Case, for charging the 2.5 cent fare.

Throughout the three Reports in the *Eastern Fares Cases* (227 I. C. C. 17, 227 I. C. C. 685, and 237 I. C. C. 271) the Commission recounted, time and again, the success of the Southern railroads under the 1.5 cent fare, which had been approved by the Commission as "not unreasonable or otherwise unlawful".

Even a slight increase in car-occupancy causes a sharp reduction in unit expenses per passenger mile.

In the *1936 Fares Case* the Commission considered and commented at length upon the relation of the expenses per coach-mile and per passenger mile in coaches to the approved fare of 1.5 cents; and to the marked effect which even a slight increase in car-occupancy (number of passengers carried per coach) would have in reducing the expense per passenger mile and increasing the profit from passenger train operations.

At page 182 of the Report in the *1936 Fares Case* the Commission said:

> "If the volume of rail passenger traffic can again be increased, the unit cost will decline when computed in the manner in which the 1933 cost was computed." (as appears in the Report and in the Appendices thereto in detail)
>
> "Thus, an increase of only 0.79 passengers in the average car-occupancy for 1933 of 11.2 in the eastern district would have been sufficient, the average passenger-mile revenue and average journey remaining the same, to eliminate the entire passenger deficit of $11,500,400 for 1933 in that district".

If a small increase of less than one passenger per car would have had such a surprising effect upon net revenue from passenger traffic in the Eastern district, it is apparent that the increase of 36.66 passengers in coach-occupancy in the south, 1943 over 1933 (from 8.3 passengers to 44.96 passengers) (Pr. 341) must have produced an enormous change in the net revenue from passenger traffic in the south, and

a vast reduction in the expense per passenger-mile in coaches. That is exactly what has happened, and what the Commission failed and refused to consider in the North Carolina Coach Fares Case.

Commissioner Meyer in his separate opinion in the *1936 Fares Case*, cited, from the evidence, an example of the marked effect of increased car-occupancy, created by extremely low fares, in increasing the profit per train. He said (214 I. C. C. at page 261): "The round-trip fare of $3.50 per passenger for the round-trip distance between Washington and New York", "approximates *three-fourths of 1 cent per passenger mile. It fills the coaches.*"

Commissioner Meyer further said, at page 261 that:

> "Assuming a coach capacity of 80 passengers, and 10 coaches to the train, if the coaches are fully occupied the train yields a net profit of $1,663. If the percentage of occupancy be 75, the net profits drop to $963, while if the occupancy is only 50 per cent the net profits drop to $263. These calculations are based upon cost data taken from the passenger-traffic report of the Federal Coordinator of Transportation. The report in this proceeding shows that average occupancy is far below 50 percent, varying with roads and regions. The fare of $3.50 approximates three-fourths of 1 cent per passenger-mile. It *fills the coaches.* If that many people should travel on all days and several times each day there would be no question of 2-cent and 3-cent fares. We would then probably have petitions to establish *quarter-cent and half-cent basic fares.*

What Commissioner Meyer described (at page 262) as "a hope or speculation" has come true. Under changed conditions the coaches are crowded beyond seating capacity. And yet the federal Commission, in its investigation of October 13, 1943, into the intrastate coach fares in Kentucky, Tennessee, Alabama and North Carolina, failed and refused to take into consideration the fact that the increase in average coach occupancy in the south from 8.3 passengers in 1933 to 44.96 passengers in 1943 (Pr. 341) had

sharply reduced the unit expenses per passenger-mile far below the then existing coach fares.

The Commission found in the *1936 Fares Case* (page 180) that for the year 1933 the "average per passenger mile thus arrived at are, for all passengers, 2.08 cents in revenue and 2.85 cents in expenses; for coaches, other than suburban, 1.88 cents (in revenue) and 2.73 cents (in expenses) respectively".

For the year 1933 the national average car-occupancy in coaches, other than suburban, was 10 passengers. (214 I. C. C. at page 266, Appendix I table 2.)

The corresponding figures, in the same table, for the Southern district, were: 1.67 cents, revenue per passenger mile and 3.25 cents expense per passenger mile in coaches other than suburban; and the car-occupancy in the Southern District was 8.3 passengers.

The coach car-occupancy of the North Carolina lines (respondents in the North Carolina Coach Fare Case) in the first seven months of 1943 had increased to 44.96 passengers or more than five times the southern district's average coach occupancy of 8.3 passengers in 1933 (Pr. 341), (Tasin's exhibit 9, page 31 in I. C. C. No. 29036).

The expenses in 1933 in the Southern district of 3.25 cents per passenger mile in coaches times 8.3 passengers made the coach-mile expense 26.975 cents. (Shown in 214 I. C. C. at page 266, Table 2, as 26.95 cents).)

That expense per coach mile divided by the 1943 coach-occupancy of 44.96 passengers would have shown an expense per passenger mile in coaches in the south of only .6 of one cent. (This does not take into consideration increased expense in 1943 over 1933.)

Thus the Commission's prophecy, that the 1.5 cent fare in the south would increase car-occupancy, thereby reducing the expense per passenger mile has been fulfilled to a surprising degree, and far beyond any reasonable expectancy which may have been justified by the facts in the year 1936.

And yet the Commission has failed and refused to consider in the North Carolina Fares Case the fact that the great increase in coach occupancy since the *1936 Fares Case*, has greatly reduced the expense per passenger-mile, and even though the Commission has expressly found that increased car-occupancy has only a very slight and negligible effect upon increased expenses, and that a change from light passenger travel to heavy passenger travel may be accompanied by only a negligible increase in the passenger train expenses.

A heavy increase in average coach-occupancy causes only a negligible increase in expense per coach-mile.

In the *Eastern Passenger Fares Case* at page 24 the Commission said:

> "The difference in the cost of operating the average train when filled and when empty or partly filled is negligible."

At page 190 in the *1936 Fares Case* the Commission found that with the reduction in fare to 1.5 cents in North Carolina on the Southern Railway:

> "The first month of the experiment in North Carolina showed an increase over the corresponding month of the previous year of 223 percent in passengers and 59 percent in revenue, with an increase in train-miles of only 0.52 percent". (p. 190)
>
> "For example, between Asheville, Charlotte, and Salisbury, N. C., and intermediate stations, it was established on January 15, 1933, and by October of that year the number of tickets sold had increased above those for the corresponding months of 1932 from 2,949 to 16,257, or 451 percent, the revenue had increased by 166 percent, and the additional train-miles operated by only 2.7 per cent. (page 190)

In the *1936 Fares Case* the Commission dealt extensively with the relation of revenue (fares) to expenses per coach

mile and per passenger mile in coaches, and the effect of increased car-occupancy upon expenses and profits. In the *North Carolina Fares Case* the federal Commission failed and refused to give any consideration whatsoever to expenses per passenger-mile in coaches under the vastly changed conditions, and failed and refused to consider proffered evidence as to the effect of the vastly increased coach occupancy in reducing the expenses per passenger mile in coaches.

Extensive statistical studies of the relation of fares to expenses of different classes of passenger service were accorded major prominence in the Report in the 1936 Fares Case.

In the Report in the *1936 Fares Case* the Commission showed, in Appendix I, Table 1, the total operating-unit expenses for the years 1929 to 1933 inclusive; in Table 2, the passenger revenues, expenses and car occupancy for the year 1933, separately for the nation and for each of the three districts; the Revenues per passenger-mile in all passenger cars, in suburban coaches, in other coaches, and in pullman cars; and separately the expenses per passenger-mile in all passenger cars, in suburban coaches, in other coaches and in pullman cars, and like statistics per passenger car-mile; and the passenger-miles per car-mile in the several types of cars (214 I. C. C. at page 266).

Table 3 shows the revenues compared with expenses per train mile, car-mile and passenger mile, separately for the different types of passenger cars, separately for limited trains, main-line local trains and branch-line local trains (214 I. C. C. at page 267).

Appendix 2 shows, by major districts, for a long period of years, 1922 to 1934, inclusive, the passengers carried, passenger revenue, passenger-miles and average journey per passenger (214 I. C. C. at pages 268 to 271).

Appendix 3 shows in elaborate tables the methods employed in determining the total constructive passenger-

miles, etc., required to produce certain revenue at varied fares.

This description of those Appendices and tables shows the completeness and thoroughness of the Commission's investigation of the relation of expenses to revenues for the various types of passenger service in the several major districts of the nation.

This description of these Appendices and tables is recited here for the purpose of directing the attention of the Court to the fact that the Commission, in the North Carolina Fares Case, failed and refused to give any consideration whatsoever to the relation of expenses per coach mile or per passenger-mile in coaches to the coach fares.

Why were those matters so all-important in the *1936 Fares Case*, and too insignificant to deserve any consideration, or even mention, in the Commission's Report in *Alabama Intrastate Fares, supra*?

Differences between the unit expenses and fares in reserved-seat pullman and parlor cars, and the unit expenses and fares in non-reserved seat coaches, were carefully analyzed in the Report in the 1936 Fares Case.

In the *1936 Fares Case* the Commission studied the relationship of expenses of travel in coaches to travel in pullman cars.

Appendix I, Table 2, shows that the expenses per passenger mile in the southern district for 1933 were 3.25 cents in coaches and 5.10 cents in pullmans (214 I. C. C. at page 266). In that year the expense in pullmans was 1.85 cents per passenger-mile *more* than in coaches.

Based upon studies of carriers in the western district the Commission found, at page 240, that the weight of pullmans is 77.78 tons, and of coaches 57.09 tons, and that:

> "upon the basis of excess weight alone, these studies would indicate that the rail charge in pullmans should be the difference between 3.014 cents and 1.485 cents, or 1.529 cents".

The Commission then found at page 241, that:

> "the present fare structures in the South and the West may not be condemned as unlawful by reason of the spreads which they reflect between the fares in pullmans and coaches".

The spread thus approved in the south was between 1.5 cents and 3 cents, a spread of 1.5 cents.

In *Eastern Passenger Fares in Coaches*, 227 I. C. C. 17, the Commission again referred to the formula for the determination of the relation of revenue to expenses of passenger traffic employed in the *1936 Fares Case*, and said, at page 24:

> "Even considering the increased operating costs to the applicants since 1936, these figures, while approximations, point strongly to the conclusion that whatever the exact passenger car deficit may be today (April 1938), it is *chargeable largely to the pullman and not to the coach service.*"

In the *North Carolina Fares Case* the Commission gave no consideration whatsoever to the spread between pullman and coach fares under the changed conditions and greatly increased car-occupancy of coaches in 1942 and 1943, and much smaller increase in car-occupancy of pullmans, as demonstrated in the evidence in the North Carolina Fares Case. The obvious effect of that great change has been to increase the spread between the expense per passenger mile in coaches and pullmans, whereas the order of the Commission in the North Carolina Fares Case reduced the spread in fares to 0.8 cent (the difference between the present intrastate pullman fare of 3.0 cents and the prescribed intrastate coach fare of 2.2 cents).

How could the Commission know what should be reasonable fares for coach service and pullman service under the greatly changed conditions of 1942 and 1943 without determining as it did before, whether the pullman as well as

coach travel is paying its proportionate share of the passenger expenses?

In the *1936 Fares Case* the Commission dwelt at length upon the relative expense of coach service and pullman service, in arriving at its conclusions. In the *North Carolina Fares Case* the Commission made no inquiry and made no finding upon this point. The Commission ignored even its own prior finding that the trouble was with *pullman*, not coach, fares.

In the 1936 Fares Case the Commission found that the superior quality of service provided in reserved seat deluxe coaches in streamlined trains justified a higher fare than in non-reserved seat coaches in ordinary trains.

In the *1936 Fares Case* the Commission considered the difference in the character or quality of the service afforded by improved de luxe equipment in "extra fare" trains and streamliners. The Commission definitely advised the carriers that improvement in quality of service was necessary in order to increase rail passenger travel. The Commission said, at page 183:

> "It seems just as certain that, no matter how much of an increase in travel volume there may be in the future, (meaning total travel by all modes of transportation) travel by railroad will continue to decline, or at least will not increase nearly as much as the increase in total volume, unless it be made more attractive than it has been in the past."

and at page 184:

> "Air conditioned and stream-lined equipment and faster schedules have helped greatly to attract traffic."
>
> "It seems plain that while continued improvements in equipment and service are highly desirable as an aid towards regaining traffic and keeping abreast of in-

creasing travel, they cannot and will not, by themselves, achieve the goal.

"The most important remaining avenue of appeal to the public is that of a reduction in fares".

There the Commission encouraged the acquisition of de luxe coaches and fast streamlined trains. And the Commission said, in *Eastern Passenger Fares in Coaches,* 227 I. C. C. at page 31, that its conclusions with respect to the carrier-proposed increase

"in the 2 cent basic coach fare should be understood not to refer to de luxe coach service, such as is afforded, for example, on the Mercury of the New York Central, which was placed in service between Cleveland, Ohio, and Detroit, Mich., in July 1936".

"We see no reason why passengers receiving coach service such as is afforded on the Mercury should not pay a HIGHER FARE than is charged for standard coach service."

In the *1936 Fares Case* the Commission separately considered the "extra fares" on certain trains and held at page 244, that:

"to justify an extra fare in addition to the standard charges the service upon which it is based should be definitely superior to that which is generally furnished".

In the *North Carolina Fares Case* the evidence shows that travel in reserved-seat de luxe coaches on streamlined trains was practically prohibited to the intrastate traveler who has to run a risk of getting any seat in an inferior coach on inferior trains.

In the *North Carolina Fares Case* the Commission failed and refused to give any consideration to the point advanced by North Carolina that the fares for travel in non-reserved seat and antiquated equipment on ordinary trains with poor schedules, should be less than the fares for travel in de luxe reserved seat coaches on fast stream-lined trains.

Many departures from the general basic coach fares were prescribed or approved by the federal Commission in the 1936 Fares Case and later cases.

In the *1936 Fares Case* the Commission prescribed or approved numerous and different fares. It prescribed 2 cent fares for coach travel in the west and in the East and approved 1.5 cents in the south. It approved fares higher than 1.5 cents in coaches for several lines in the south which had not published the 1.5 cent fare. It approved reasonable extra fares for service which is "definitely superior to that generally furnished" (214 I. C. C. at page 256). Many departures from the general or basic fares were approved, such as the fare of 6 cents per mile for coach or pullman service on the Grand Canyon line of the Sante Fe (214 I. C. C. at page 245); and 4 cents in pullmans and 2.667 in coaches between Whitewater and Fierror, N. Mex. The Gillmore and Pittsburgh Railroad Company, Limited, was permitted to charge 3 cents per mile in all classes of equipment (214 I. C. C. at page 245). Numerous other varying fares stated on page 245 were approved. The practices of adding inflated mileages for certain lines for tunnels or bridges, and the addition of bridge arbitraries were also approved (at page 246).

In a First Supplemental Report in the *1936 Fares Case*, 215 I. C. C. 350, the Commission approved widely varying fares for a number of individual railroads, and some of them published the same fares for coaches as for pullman service. Others carried much higher one-way fares than the round-trip fares. This was in accord with the Commission's finding in the first report in the *1936 Fares Case*, 214 I. C. C. at page 255, that

> "it may be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares."

The practice of maintaining lower round-trip than one-way fares is shown by the several reports in the passenger fares cases to be nationwide, but not uniform, as indicated above.

In the Second Supplemental Report in the *1936 Fares Case*, 215 I. C. C. 673, additional variations, from the general basic fare were approved for eight additional railroads, among which were the two North Carolina lines, viz., the Tennessee & North Carolina Railway Company, and the Norfolk Southern Railroad Company. The former charged a little less than 3 cents per mile and the latter 2.5 cents per mile in coaches and 1.4 cents for commutation fares (215 I. C. C. at pages 674, 675, 676).

The practice of charging lower fares for commutation service than for the general basic fares has been approved in numerous proceedings before the federal Commission, although

> "In the South and West commutation traffic has been relatively less important than in the East, but in all districts it has been steadily increasing in relative importance" . . . (214 I. C. C. at page 177)

See *Commutation Fares Between Washington and Virginia*, 231 I. C. C. 397; *Passenger Fares of Hudson & M. R. Co.*, 227 I. C. C. 741, 743, 753.

Different commutation fares were approved in different areas as being not discriminatory in *Davis* v. *Pennsylvania R. Co.*, 226 I. C. C. 723, 729.

In the Third Supplemental Report in the *1936 Fares Case*, 220 I. C. C. 749, the Commission approved additional exceptions of a number of individual railroads from the general basic fares, including one of the North Carolina lines, the Maxton, Alma & Southbound Railroad Company. Its fares averaged about 3.6 cents per mile (220 I. C. C. at page 750).

In like manner, the North Carolina Utilities Commission, in the proceeding before it, which was initiated prior to the federal Commission's investigation of the North Caro-

lina intrastate fares, gave consideration to the fares of individual lines and took different action with respect to the needs of individual lines, just as the federal Commission did in the First, Second and Third Supplemental Reports in the *1936 Fares Case*.

And yet the federal Commission, in the North Carolina Fares Case failed and refused to give consideration to the separate treatment of the individual lines by the North Carolina Utilities Commission.

Summary of the major findings in the 1936 Fares Case.

The *1936 Fares Case* was the first comprehensive investigation of the passengers fares for the several classes of passenger service. No such investigation has been made since then.

The Commission prescribed a basic fare of 2 cents per mile in coaches but approved the 1.5 cent fare in the South, and found that the fare of 1.5 cent was "not unreasonable or otherwise unlawful".

The Commission found that the southern carriers had been greatly benefited by the coach fare of 1.5 cents; and that the principal railroads strongly urged that that fare be continued.

The Commission specifically recognized the necessity and the justification for the maintenance of the fare of 1.5 cents in the south in the interest of the southern carriers, on a lower basis than the general maximum prescribed fare of 2 cents for the Eastern and Western districts.

The Commission gave special consideration to the relation of expenses per passenger mile in coaches to the coach fares and found that even a slight increase in car-occupancy causes a sharp reduction in unit expenses per passenger mile. Commissioner Meyer cited an instance where a fare of three-fourths of one cent "fills the coaches".

The Commission's prophecy, that the reduced coach fares which it prescribed and approved would increase car-occu-

pancy, reduce unit expense, and provide increased net revenues to the carriers, was more than amply fulfilled.

Increasing the average coach-occupancy causes only a negligible increase in the expense per coach-mile.

Extensive statistical studies of the relation of fares to expenses of different classes of passenger service were accorded major prominence in the report in the *1936 Fares Case*.

Differences between the unit expenses and fares in reserved-seat pullman and parlor cars, and the unit expenses and fares in non-reserved seat coaches, were carefully analyzed in the Report in the *1936 Fares Case*.

The Commission found that the superior quality of service provided in reserved-seat de luxe coaches in streamlined trains justified a higher fare than in non-reserved seat coaches in ordinary trains.

Many departures from the general or basic coach fares were prescribed or approved by the federal Commission in the *1936 Fares Case* and later cases.

Because of the scope of that investigation, and the character of evidence submitted, and the extensive findings made, and the principles of rate-making which were invoked by the federal Commission, and because no like investigation of interstate coach fares in the south had been made prior to that time or has been made since that time, the State Commissions of Kentucky, Tennessee, Alabama and North Carolina, in the proceedings before them, before the federal Commission and before the 3-Judge Court in Kentucky and North Carolina had the right to rely upon the findings of the Interstate Commerce Commission that conditions in the South warranted the lower basic coach fare of 1.5 cents than the prescribed fare of 2 cents in other major regions of the country; and they had the right to rely upon the finding that the fare of 1.5 cents which had and has proven so successful for the southern carriers, was "not unreasonable or otherwise unlawful".

Coach fares in the South have not been the subject of investigation by the federal Commission since the Four Reports in the *1936 Fares Case*, the latest of which was decided April 12, 1937.

1938-1940.

The Eastern Coach Fare Cases—1938-1940.

In *Eastern Passenger Fares in Coaches*, 227 I. C. C. 17, decided April 4, 1938, the federal Commission considered the application of the railroads in the eastern district with some exceptions, and in the Pocahontas Region, for authority to increase their basic passenger fare for travel in coaches from 2 cents to 2.5 cents per mile. The Commission found that the proposed increase had not been justified (227 I. C. C. at page 31).

In the Second Report in *Eastern Passenger Fares in Coaches*, 227 I. C. C. 685, decided July 5, 1938, the Commission, because of the fact that the "financial condition of the applicants has become progressively worse" and that the applicants were "in serious need of additional revenue" (227 I. C. C. at page 685) permitted an increase in coach fares from 2 to 2.5 cents for a limited period of 18 months.

In the Third Report in *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, decided February 21, 1940, the Commission, after the expiration of that 18-months period, found that

> "The future net revenue results to the eastern railroads will probably be more favorable under a 2-cent than under a 2.5-cent basic coach fare in the eastern territory"

(237 I. C. C. at page 286), and the Commission denied the carriers' petition for an extension of the time within which to charge 2.5 cents.

Throughout the three reports in the *Eastern Coach Fare Case*, the Commission recounted, time and again, the suc-

cess of the southern railroads with the 1.5 cent fare, and said: (237 I. C. C. at pages 272-273)

> "On November 15, 1937, most of the southern roads increased their basic coach fare from 1.5 cents to 2 cents. As detailed in our third report, the results of that increased fare were disappointing, and on January 15, 1939, those roads restored the basic fare of 1.5 cents. On June 1, 1939, they established the round-trip coach fare of 1.35 cents.

Thus the *basic one-way fare for travel in coaches on most of the southern railroads was 1.5 cents from December 1, 1933 until February 10, 1942, with the exception of the brief period of fourteen months from November 14, 1937 to January 15, 1939, when the experience with the 2 cent fare proved unsuccessful, and the 1.5 cent fare was restored.*

1942.

On February 10, 1942 the coach fares of 1.5 cents in the South were subjected to the nationwide horizontal increase of 10 per cent, which was applied to interstate fares. The State Commission permitted a concurrent increase in the intrastate fares.

The Nationwide Horizontal Increase in 1942 under I. C. C. Ex Parte 148.

Increased Railway Rates, Fares and Charges, 1942, 248 I. C. C. 545.

In November 1941 groups of railroad employes threatened a general railroad strike for higher wages throughout the nation effective December 1941 (248 I. C. C. 550).

In that month,—the month of the Pearl Harbor disaster, and the declaration of war against Japan,—the railroads throughout the nation on December 13, 1941 petitioned the federal and state commissions for authority to increase all of their rates, fares and charges (with some exceptions)

whatever they were or happened to be, by 10 per cent, because of that impending nationwide strike, which would have imperilled seriously the feverish preparations for war in the Pacific.

Joint expedited hearings were held by the federal and state commissions.

The fact that the entire proceedings received unusual expedition is shown by the fact that the case was submitted January 14, 1942, just one month and a day after the petition of the carriers was filed, and the case was decided March 2, 1942.

That proceeding, known as *Ex Parte 148, was not an investigation into the reasonableness of any particular rate or charge or fare, of any type, on any line, in any district.* The proposal was to apply the horizontal increase of 10 per cent to all rates for freight of all kinds with some exceptions, throughout the country, and to increase the existing fares of all kinds by 10 per cent, whatever they were, except that no increase in fares was proposed for members of the military or naval forces of the United States traveling on furlough; and except that the increase in fares was not to apply to extra fares on particular trains (248 I. C. C. at page 550).

The nature of the proceeding, and the threatened strike which had precipitated the investigation, and the great expedition of the hearings, briefs and argument precluded anything but a general examination of the revenue needs of the national transportation system.

The Commission's Report, consisting of *80* printed pages, dealt almost incidentally and only generally with passenger fares, in less than 3 of the 80 printed pages (248 I. C. C. at pages 564, 565 and 566). The only specific references to coach fares consisted of very general statements as to what the existing basic fares were in the respective regions. (at page 564)

The Commission said that:

"In coaches, one way, 2 cents per mile in the East and West and *1.5 cents in the South;* round trip, in the East, except locally in New England, a descending scale from 2 cents for the shorter hauls to 1.5 cents at 533 miles, 1.8 cents in the West, and *1.35 cents in the* South."

Thus different basic and special fares were in effect in different parts of the country.

The 10 per cent order of January 21, 1942.

Just *one week after* the submission of that case, and nearly *six weeks before* the decision in that case, the Commission did a very unusual thing. Without the issuance of any report whatsoever upon the facts of record, the Commission *entered an order* in Ex Parte 148, on January 21, 1942, approving the proposed increase of 10 per cent in all existing fares, whatever they happened to be at the time (Pr. 521).

In its first Report in Ex Parte 148, *Increased Railway Rates, Fares, and Charges,* 1942, 248 I. C. C. 545, the Commission found at page 612, that:

"the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable if passenger fares are increased to the extent already permitted by our order (of January 21, 1942), and if freight rates and charges are increased to the extent indicated below. . ."

The increase permitted in freight rates, etc., with some exceptions was 6 per cent. (at page 612)

The Commission said (at page 613) that:

"The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency." . . .

"Rates and charges increased as herein permitted are not *prescribed* rates and charges within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370."

The Commission's explanation of the 10 per cent order of January 21, 1942.

At page 565 of the Report in Ex Parte 148 the Commission said:

> "In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway-transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful",

and at page 566:

> "We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.
>
> "The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed."

That 10 per cent Order prescribed no fares. It merely permitted an increase of 10 per cent in each existing fare, whatever it happened to be, because of the emergency.

There was no opposition to that 10 per cent Order. The 10 per cent increase was published to apply on all existing coach fares for interstate and intrastate traffic alike.

The sole effect of the 10 per cent Order of January 21, 1942, upon the one-way coach fare of 1.5 cents in the south was to permit it to be increased by 10 per cent to 1.65 cents.

None of the Findings in the *1936 Fares Case* were reconsidered, or reversed, or changed in any respect or in any degree by the 10 per cent Order except that an emergency increase of 10 per cent was permitted, because of the threatened general strike during emergency conditions of war.

In the report in Ex Parte 148 (248 I. C. C. 545) the finding at page 565—that "the proposed increased fares will be reasonable and lawful"—is, in substance and effect, (as applied to the southern basic coach fare of 1.5 cents, in-

creased 10 per cent to 1.65 cents), a finding that the 1.65 cent fare in the south is and "will be reasonable and lawful" as of the date of that decision—March 2, 1942.

As the states of North Carolina, Kentucky, Tennessee and Alabama relied heavily upon the federal Commission's finding in the *1936 Fares Case*, that the coach fare of 1.5 cents in the south was "not unreasonable or otherwise unlawful", so likewise they, after permitting the 10 per cent emergency increase, effective February 10, 1942, relied again upon the federal Commission's finding in Ex Parte 148 that the fare of 1.5 cents, increased by 10 per cent, to 1.65 cents "will be reasonable and lawful" for the future.

July-August 1942.

The railroads' application for authority to increase the interstate coach fare in the south from 1.65 to 2.2 cents.

On July 14, 1942, the railroads in the south, which were maintaining the coach fare of 1.5 cents, increased by 10 per cent to 1.65 cents, filed a separate petition with the federal Commission for authority to publish another such increase to 2.2 cents.

The federal Commission, arbitrarily and unjustly, entered *a hasty order on August 1, 1942* about two weeks after that application had been filed, *granting the Application, without any hearing, without any Report, without any evidence, and without any findings.*

That Application was given a Docket Number of its own but was changed by the Commission to the Ex Parte 148 docket number, but it had no place therein. It was a separate application, raising new issues, not raised in Ex Parte 148, as to a particular fare for a particular service by particular carriers for a particular region, after the nation-wide increase of 10 per cent had been added to the 1.5 cent fare.

The additional increase applied for—from 1.65 cents to 2.2 cents in coach fares—amounted to 33.3 per cent.

Apparently the Number of the Application was changed to Ex Parte 148 as a technical means of avoiding a separate investigation, and to avoid a hearing, and to circumvent the statutory requirement that, at such hearing involving such change in fare, "the burden of proof shall be upon the carriers to show that the proposed change . . . fare . . . is *just and reasonable,*" as provided in Section 15 (7) of the Interstate Commerce Act. (U. S. Code, Title 49, Section 15 (7), 54 Stat. L. 912. See Appendix A to this Brief.)

There is a difference between the Order of January 21, 1942, and the Hasty Order of August 1, 1942 in that the former Order was followed later by confirmatory findings in the main Report in Ex Parte 148 (248 I. C. C. 545) as to the 10 per cent increase whereas there was *no subsequent Report* or findings to buttress the Hasty Order of August 1, 1942, which granted the additional increase of 33.3 per cent from 1.65 to 2.2 cents per mile.

The southern railroads by authority of the Hasty Order, increased their interstate coach fares from 1.65 cents to 2.2 cents, effective October 1, 1942.

The Hasty Order of August 1, 1942 was entered so quickly that *the public had no opportunity to protest, or to be heard* upon the Railroads' Application of July 14, 1942 for an additional increase of 33.3 per cent in coach fares.

The first opportunity afforded the public to voice any objection to such increased fares effective October 1, 1942, was *after* the tariffs had been filed.

Protests and petitions for suspension of the increased southern coach fares were duly made and filed; but the federal Commission arbitrarily *denied* the protests and petitions and permitted the increased coach fares to become effective October 1, 1942, *without any investigation, or hearing, or evidence, or Report.*

At no time prior to the entry of the Hasty Order of August 1, 1942, and the denial of the protests and petitions for suspension of the 33.3 per cent increase in coach fares ef-

fective October 1, 1942 under authority of the Hasty Order, was there any conflict or authority between the federal Commission, the Price Administration and the four State Commissions.

It was the arbitrary act of the federal Commission in entering its Hasty Order and in denying the right to the public, the State Commissions and the Price Administration to be heard with respect to this separate proposal of these certain southern railroads, which precipitated this litigation by the four states and the Price Administration against the federal Commission.

Summary of history of 1.5 cent fare, 1933 to October 1, 1942.

Now let us summarize the history of the coach fares in the south up to that date—October 1, 1942.

The fare of 1.5 cents was found not unreasonable or otherwise unlawful in the *1936 Fares Case*. That fare was subjected to the nationwide horizontal emergency increase of 10 per cent, to 1.65 cents, effective February 10, 1942, which was found to be reasonable and lawful for the future in the First Report in Ex Parte 148.

Without hearing, without evidence, without findings of fact and without Report the federal Commission arbitrarily, by its Hasty Order of August 1, 1942, granted the special application of certain southern railroads permitting that 1.65 cents fare to be increased 33.3 per cent effective October 1, 1942, and the Commission precluded any opportunity to the public to be heard, and denied the protest against that increase and denied the petition to investigate the increase.

Those arbitrary acts precipitated this litigation.

1943.

The Second and Third Reports in Ex Parte 148.

Not in the Second or Third Reports in Ex Parte 148 were any findings of fact set forth which would support the Hasty Order of August 1, 1942 with respect to coach fares in the South.

In the Second Report in Ex Parte 148, *Increased Railway Rates, Fares and Charges*, 1942, 255 I. C. C. 357, submitted February 23, 1943, decided April 6, 1943, the Commission admitted that it had made a mistake in the 1942 Report, and it found that the increases in *freight* rates, established pursuant to its 1942 Report, were unjust and unreasonable "for the remainder of 1943"; and that the freight rates, with the previously authorized increases eliminated "will meet the objectives of the national transportation policy" (255 I. C. C. at pages 393, 394). The Commission further found that:

> "the added revenue resulting from the increases in freight rates and charges authorized in the original report is *not necessary or justified under present conditions.* (p. 394)
>
> "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects". (page 394)
>
> "Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight". (page 394)

After stating what the general bases of current fares were and after discussing commutation fares, the Commission said:

> "We find that no modification of our previous findings, orders, and authorizations respecting the present interstate standard passenger fares is necessary. We further find that the authority heretofore given with respect to the increase in commutation fares should be revoked". (at page 395)

This summary is about all that the Commission said or considered in its second Report of 1943 in Ex Parte 148 with respect to passenger fares.

Attention is directed to the fact that the Second Report in 1943 reversed the First Report in 1942 and eliminated the

horizontal increase in freight rates and charges and commutation fares, and merely left in effect the horizontal increase of 10 per cent on all passenger fares other than commutation. That finding as to passenger fares was wholly negative in form.

The Second Report in 1943 did not set forth any specific findings with respect to pullman fares, or reserved-seat fares, or extra train fares or coach fares, and did not show what effect the "unusually high earnings, resulting from a volume of traffic which is taxing the capacity of all of their facilities, both freight and passenger", (at page 397) had had upon the unit costs in relation to expenses, or what effect the increased volume of traffic and travel and car-occupancy had had upon the relation of coach revenues per car-mile and passenger-mile to coach expenses per car-mile and passenger-mile respectively.

The Commission's only finding of fact, with respect to passenger fares was the finding, in relation to *all* fares, that:

> "as shown by the reports for 1942 and the current reports so far made this year (1943) the operating ratio remains decidedly less favorable for passenger and allied services than for freight". (at page 394. See also page 368)

And even that bare finding, unsupported by any statement of facts, could have related only to the month of January 1943, for the reason that the Second Report was based upon a record which was closed in February 1943, before the February 1943 reports of the carriers were available. And even that bare finding was not true as to the principal North Carolina lines which are under consideration in the North Carolina Case, where the evidence shows that their average passenger operating ratio was lower and more favorable in 1943 than their freight operating ratios.

Attention is directed to the fact that there is nothing in the Second Report for 1943 which condemns in any way

or in any degree the southern fare of 1.5 cents which had been approved by the Commission, which was stoutly advocated by the Southern Railway and others, in the 1936 Fares Case, and which had been increased 10 per cent, under Ex Parte 148.

In other words, the 1936 Fares Case, the 1942 horizontal Increase Case and the 1943 Second Report in the horizontal increase case, leave the 1.5 cent fare in the south, as increased by 10 per cent under Ex Parte 148, heartily approved and sanctioned by the Interstate Commerce Commission; and there is nothing in the 1942 and 1943 Reports in Ex Parte 148 which in any way condemns or reverses the findings in the 1936 Fares Case as to the reasonableness of the 1.5 cent fare as increased 10 per cent under Ex Parte 148, or the finding in the First Report in Ex Parte 148 that the fare of 1.5 cent so increased, would be "just and reasonable for the future".

In the Third Report in Ex Parte 148, *Increased Railway Rates, Fares, and Charges*, 1942, 256 I. C. C. 502, submitted October 30, 1943, decided November 8, 1943, the Commission extended the period of suspension of the Ex Parte 1942 increases from January 1, 1944 to June 30, 1944.

There is no finding whatsoever with respect to passenger fares, or coach fares in that Third Report.

1944.

In the Fourth Report in Ex Parte 148, 258 I. C. C. 455, decided May 12, 1944, the Commission continued the general level of the rates, as they were left by the Third Report.

On October 23, 1944, the Commission began further hearings and argument in Ex Parte 148 to determine whether the horizontal increases on freight charges, which had been suspended, should be permanently cancelled and whether the 10 per cent horizontal increase in passenger fares should be removed permanently. Oral argument was concluded on November 3, 1944.

In the Fifth Report in Ex Parte 148, 259 I. C. C. 159, decided December 12, 1944, the Commission found that a modi-

fication of the previous findings, orders and authorizations with respect to interstate southern passenger fares was not warranted. See pages 186 to 189, 193, 194.

Commutation fares.

In the report on further hearing in Ex Parte 148, 255 I. C. C. 357; the Commission said:

> "The question whether the basic commutation fares should be increased requires further investigation. We therefore shall resume investigation of commutation fares at the stage where this proceeding began, and will invite the cooperation of the regulatory bodies of the states particularly interested, with a view of determining what, if any changes, should be made in these fares. . . ." 255 I. C. C. 357 at page 395.
>
> "We further find that the authority heretofore given with respect to the increase in commutation fares should be revoked, and that the question whether any increase should be made therein, in order to accomplish the purposes of the National transportation policy and the Interstate Commerce Act, should be investigated further by us as respects interstate commutation transportation. In that investigation, which will be independent of the present proceeding, as above indicated, we shall invite the cooperation of the regulatory bodies of the states as concerns their intrastate commutation traffic". 255 I. C. C. at page 395.

Thus the federal Commission did with respect to commutation fares, one type of coach service, what the four Southern state commisisons asked it to do with respect to other coach fares. The federal Commission admitted its mistake, in its first report in Ex Parte 148, in applying the horizontal increase to commutation fares and declined and refused to give the requested separate consideration and treatment of other coach fares of the southern carriers.

Separate investigation of commutation fares was thereafter made in several separate proceedings, such as No. 28991, *Passenger Fares Between District of Columbia and Nearby Virginia*, 256 I. C. C. 769 and 258 I. C. C. 559 on further hearing and reconsideration; No. 28972, *Interstate*

Commutation Fares—New England, which was discontinued on petition of the Boston & Albany, Boston & Maine and New Haven; No. 28974, *Interstate Commutation Fares—Chicago, Ill. District;* No. 28973, *Interstate Commutation Fares—New York;* 28975, and *Interstate Commutation Fares, Philadelphia-Camden District.*

There is no intimation in the Commission's decision in Ex Parte 148 or the interstate commutation fares cases why commutation fares should receive separate and special consideration any more than other coach fares. The commutation fares are on a much lower general level than other coach fares, and therefore the commutation fares do not contribute as much towards the maintenance of the railroads as other coach fares.

In the *1936 Fares Case,* 214 I. C. C. at page 266, the average fare in suburban coaches (commutation) is shown as 1.33 and in other coaches 1.88 cents per passenger mile. The revenue per passenger mile in coaches (other than commutation) for the six North Carolina lines is shown by the railroads to have been 1.56 cents per passenger mile in 1942 (Pr. 328). In the cumulative monthly statement M-220 for December the year 1942 for the Southern Region the revenue for 1942 from commutation passenger traffic is shown to have been 1.12 cents per passenger mile, and the average for the United States for commutation passenger traffic was 1.06 cents per passenger mile.

Why did the Commission reverse itself and require the elimination of the horizontal increase of 10 per cent under Ex Parte 148 from commutation fares, which are so much lower than other coach fares, and fail and refuse to consider or reconsider the reasonableness of the coach fares other than commutation which, in 1942, averaged almost the same as the North Carolina intrastate coach fares of 1.65 cents?

The act of the federal Commission, in making separate and independent investigations into the reasonableness of the commutation fares for travel in coaches, upon the peti-

tions of various railroads, and in failing and refusing to make like separate and independent investigations into other fares for travel in coaches, upon petition of the Southern State Commissions and the Price Administrator was arbitrary.

Short summary of the chronological narrative.

This chronological narrative of the proceedings before the federal Commission with respect to coach fares shows:

That the fare of 1.5 cents in the south was specifically approved and sanctioned as not unreasonable or otherwise unlawful in the past, and as increased 10 per cent to 1.65 cents, is *just and reasonable for the future;*

That the increase of 33.3 per cent in the interstate coach fares in the South was permitted to become effective without any hearing, or finding or Report of the Facts, and without any reversal or modification of those findings in the *1936 Fares Case* and Ex Parte 148; and

That the Unsupported Hasty Order of August 1, 1942, stands squarely in conflict with the extended investigation in the *1936 Fares Case* as modified by 10 per cent and reaffirmed in the Four Reports in Ex Parte 148 through December 1944.

The four State Commissions, having due regard for the interests of the Public and the Price Administration, and respect for due process of law (which seems to have been disregarded and ignored by the federal Commission in entering its Hasty Order of August 1, 1942, and in denying the protests and petitions for suspension) assigned the railroads' like applications for the 33.3 per cent increase in intrastate coach fares for public hearing, in their accustomed manner.

This brings us to the proceeding before the North Carolina Commission.

The case before the North Carolina Commission.

Not until October 12, 1942, 12 days after the 33.3 per cent increase in interstate fares authorized by the Hasty Order of August 1, 1942 had become effective, did the railroads file with the North Carolina Utilities Commission, an application for authority to increase their intrastate fares.

The application was heard before the North Carolina Commission May 20, 1943.

The evidence presented by the carriers was perfunctory. The carriers, then opulent, disavowed any need of revenue, and made no claim of discrimination against interstate commerce. The nature of the evidence presented and points of proof upon which their evidence was lacking, are accurately described in the testimony of Judge Hunter, a member of the North Carolina Commission, in the later Section—13 proceeding I. C. C. No. 29036 before the Interstate Commission, as follows: (Pr. 248)

> "The main issue presented in this case, (before the North Carolina Commission), was whether or not the existing intrastate fare of 1.65 per mile should be increased to 2.2 cents per mile. Some evidence was offered in that case oral in its nature and also considerable testimony in the form of exhibits. The Utilities Commission considered very carefully all of the testimony which was presented on behalf of the petitioners, and it could not find from the testimony facts which would justify the increase of the coach fares to 2.2 cents or to any other figure. In other words, the testimony presented to the Commission at that time was not such that it could make any calculation or arrive at any specific figure which it felt would justify it in fixing the proper rate.
>
> "The testimony as we viewed it justified a figure of 1.65 or lower, just as much as it did any point above that figure."
>
> "I think it probably would add something to an understanding of our position and the order which we made in Docket 2789 to briefly group and number the points which the (North Carolina) Commission con-

sidered and which gave it some concern. These points being briefly these (Pr. 249):

"1. That the cost or statistical evidence was rather limited and general in its nature. It related to south-wide or system operations and not to operations within the State of North Carolina. This was particularly necessary as we viewed the matter in view of the fact that our Commission is limited to the State of North Carolina, and the problem presented before us was a problem of arriving at just and fair and proper charges for operations within the state. (tr. 169-170)

"2. While there was some statistical data with respect to North Carolina, there was no attempt made on the part of petitioners to prove the cost of coach fare service in the State of North Carolina, or for that matter, in any other state.

"3. There was no attempt to determine the cost separately of Pullman car service, or mail service, and express service, troop train service. There was no evidence which tended to show that these classes of services were being operated at fares which would produce net passenger operating losses or gains.

"There was considerable testimony in the hearing before our Commission to the effect that troop train movements were expensive, and just how expensive, we were not advised but left with the impression that they were rather unusually expensive as compared with other types of coach service. Whether or not this class of service bears its proper burden of coach train operations within the State was not developed. In the proceeding before the State Commission there was no issue presented with respect to the fares or charges for troop movement. That is a matter of contract between the federal Government and the railroads. It is a matter that was not presented to us. We did not consider it. (tr. 171)

Pr. 250:

"I may add further that there is no attempt to show that the difference between coach fare service and Pullman service in relation to the difference in cost of these

two classes of service, the difference in charges being considerable.

"The Utilities Commission was not advised of the cost of passenger per coach mile in North Carolina, neither was it advised of the revenue per passenger per coach mile.

"The things I have mentioned are things which did not appear in the testimony, and there there was this thing that did appear quite denitely, that was that the petition was not being based upon a need for added revenue. On the contrary it was not presented as a revenue case and it was so stated, I believe, by the petitioners themselves.

"The evidence indicated that certain of the weak lines were in need of revenue, and probably could have justified an increase in rates on the basis of revenue". (tr. 172-173)

Pr. 248:

"The (North Carolina) Commission, therefore, made its findings of fact, and it issued its order which was *not final* in nature but was in the nature of an *interlocutory order*, and in this order it advised the petitioners that it proposed to petition the Interstate Commerce Commission to make an investigation with respect to interstate rates of carriers involved, interstate rates to and from points in North Carolina and through North Carolina. (tr. 168-169)

"As I say, this order was in the nature of an interlocutory order. Its effect was to defer any ultimate decision in the case until such time as the Interstate Commerce Commission might pass upon its petition and perhaps supply it with what it considered needed information which it did not have.

Pr. 248-249:

"This order of the Utilities Commission did not in any manner close the door to the petitioners. It left it open, and the door, in fact, is still open to them. There was no petition or request or suggestion on the part of the petitioning railroads to reopen the case or to rehear it or to reconsider the findings of fact."

Petitions to the Interstate Commerce Commission to investigate the reasonableness of the interstate fare of 2.2 cents per mile were filed not only by the North Carolina Utilities Commission, but also by the State Commission of Alabama, and by the Office of Price Administration.

All of such petitions to the Interstate Commerce Commission to investigate the interstate coach fares were denied by the Interstate Commerce Commission without any report of its findings or Order, upon which the denial of the Interstate Commerce Commission was based.

Such summary dismissal by the federal Commission of petitions of the two state commissions does not exhibit that spirit of comity and consideration which Congress expects under the provisions of Section 13 (2) of the Interstate Commerce Act.

Subsequently the North Carolina Commission called upon the railroads to furnish data such as the relation of revenue to expenses per passenger mile in coaches, so as to supplement the weak and insufficient evidence which had been presented by the carriers at the hearing before the North Carolina Commission (Pr. 451-510). *This the principal carriers failed to do* (Pr. 510-517 & Pr. 532-544). Thereupon the North Carolina Commission, upon supplemental data, issued another order *permitting certain weak lines*—the Clinchfield and the Norfolk Southern,—*to increase their coach fares*, and refusing again to grant the increase to the four opulent lines, such as the Atlantic Coast Line, the Louisville & Nashville, the Seaboard Air Line and the Southern Railway (Pr. 28).

These are the four carriers whose intrastate coach fares in North Carolina were at issue in the case before the District Court of North Carolina. They will be referred to hereinafter as the North Carolina railroads although they serve some or all of the three other states of Kentucky, Tennessee and Alabama.

The North Carolina Case before the Federal Commission.

The North Carolina railroads, after the interlocutory order of the North Carolina Commission and without filing any petition for further hearing, and without furnishing the supplemental data requested by the North Carolina Commission, filed a Section 13 complaint with the federal Commission seeking its authority to increase their intrastate coach fares in North Carolina (Pr. 121).

The federal Commission on October 13, 1943, then instituted its investigation, No. 29036, to determine whether the refusal of the North Carolina Utilities Commission to authorize or permit the application to the transportation of passengers traveling intrastate in North Carolina of coach fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and to determine what fares and charges, if any, or what maximum or minimum, or maximum and minimum fares, and charges, shall be prescribed to remove such unlawful advantage, preference, prejudice, or discrimination, if any, as may be found to exist (Pr. 141).

A hearing in the North Carolina Coach Fares Case was held December 28-29, 1943 (Pr. 143).

Description of the types and extent of the evidence in the North Carolina Coach Fares Case before the Federal Commission, I. C. C. No. 29036.

Transportation and traffic evidence.

The railroads, to support their Section 13 complaint against the intrastate coach fares in North Carolina, presented ten witnesses.

Witness Blackwell described the Southern Railway System, and stressed the difficulties and expenses encountered in the movement of troop trains (tr. 16-18) (Pr. 151, 153, 159, 160). The charges for troop train movements are a matter of contract between the carrier and the federal government, and not at issue in that proceeding.

Mr. Blackwell also described civilian train operations (tr. 20-29) (Pr. 152-165).

Witness Barry, A.P.T.M., of the Southern Railway, explained in detail the existing fares, and the history of the fares (tr. 38-45, and Exhibit No. 1) (Pr. 166-179).

He cited instances of intrastate travel and interstate travel, and differences in fares for certain distances, and explained how interstate travelers might defeat interstate fares by purchasing a second ticket for the portion of the journey to a point in North Carolina (Exhibits 2 and 3, tr. 48-49). He expressed the view that the conditions of interstate and intrastate travel are similar (tr. 50), but admitted that the de luxe streamlined fast trains run through the narrow part of North Carolina, from north to south, and not through the long part of the state—from east to west; that the fast through trains on the Southern stop at only six points in North Carolina; and that all trains do not stop at all points in North Carolina (tr. 52-57) (Pr. 176-177).

Mr. Barry admitted that the Southern's experiment in 1933 with the 1.5 cent coach fare so impressed the Southern that it desired to continue it, in order to obtain the greatest gross revenue from passenger traffic. And he admitted that the 1.5 cent fare resulted in substantial increases in passengers and in passenger revenue (tr. 59-60) (Pr. 178-179).

Witness Beuchler, Clerk to the Auditor of the Southern Railway, presented tabulations showing the number of tickets sold at certain origins, so as to establish that from a given point in North Carolina some persons travel to intrastate points and some to interstate points (Ex. 4, tr. 61-66) (Pr. 180-184).

Witness Lynch, G.P.A. of the Atlantic Coast Line Railroad, presented simple comparisons to show the differences between interstate and intrastate fares; (Ex. 5, 7, 8) and the possibility of a traveler selecting an optional intrastate route between two points at lower fare than over an interstate route between the same points; (Ex. 6) but he failed to give the distances via the two routes, so that the comparison is meaningless (tr. 67-73). (Pr. 184-189).

Witness Hanes, an investigator in the law department of the Southern was permitted to testify, over objections, that he had made a "very incomplete investigation" (tr. 76) (Pr. 190) with the assistance of "some half dozen or more of our claim men" (tr. 76) (Pr. 190) and "had gotten a partial list of people who travel interstate into North Carolina for the purpose of selling goods or other business" (tr. 77) (Pr. 190) and who come in competition with concerns that are located in North Carolina (tr. 79) (Pr. 191). But he admitted that his work was carried on in part "over the telephone and I picked up what information I could in the time I had to pick it up in; (tr. 85) (Pr. 195); and that statements which he had made represented oral statements made to him by other unnamed employes of the Southern Railway, that some of it "was in writing" and that "a good deal of it was gathered over the telephone" (tr. 86) (Pr. 196). His admissions show that his testimony was inadmissible. The objections thereto (Pr. 196-198) should have been sustained (tr. 86) (Pr. 189-200).

The railroads' statistical evidence.

Mr. Tassin, General Statistician of the Southern Railway (Pr. 201), presented four large exhibits, 9 to 12, incl. (Pr. 315-382), consisting of some 73 pages of statistical data, which are indicative of the wealth of data available to the railroads. His exhibits show that there has been a vast and complete change since the Report in the *1936 Fares Case*; that the financial conditions of the four North Caro-

lina lines, during the process of change in economic conditions has reached a stage of unprecedented opulence; that there has been a vast increase in earnings from passenger traffic and a sharp drop in passenger operating ratios; and that the car-occupancy, particularly in coaches has multiplied several times over the 1936 average. In fact, Mr. Tassin's exhibits prove almost everything that was essential to warrant a denial of the four railroads' proposed increase in coach fares except the most important single factor—viz., the current expense per passenger-mile in coaches. The omission of that item from this wealth of data is glaringly conspicuous.

Mr. Tassin's Exhibit 9, page 4, shows the estimated amounts of increased revenue which would have been collected from North Carolina intrastate travelers if the proposed increased fares had been in effect during three respective periods. The figure for the year ended September 30, 1943 is $566,823 (Pr. 317).

The huge increase in net passenger operating income.

Exhibit 9, page 5, shows that the net railway operating income from passenger traffic changed from an average deficit of $10,272,080 for the seven years, 1936 to 1942 inclusive, of six North Carolina railroads, including the Clinchfield and the Norfolk Southern to a profit of $26,699,988 in 1942 (Pr. 318). In 1942 the four roads, A. C. L., L. & N., S. A. L. and Southern, earned large profits from their passenger traffic. The aggregate profit of the six roads of $26,699,988 included the deficits of the Clinchfield and the Norfolk Southern, which should be excluded for the reason that the North Carolina Commission permitted the increases in their coach fares.

The huge increase in net income on all traffic.

Exhibit 9, page 6, shows that the class i railways in the southern region (not including the rich Pocahontas lines) earned in the aggregate from all operations, a net income

after taxes of $10,743,969 in 1936—the year of the Report in the *1936 Fares Case*, when the coach fare of 1.5 cents was found not unreasonable by the federal Commission. The net income increased to $74,845,799 in 1941 and the 1941 figure was more than doubled in 1942 to $153,250,208. That net income for 1942 was left after setting aside $214,151,928 for payment of taxes (Pr. 319).

High rate of return.

Page 6 also shows that even computing the rate of return on investment *after* taxes, the average rate of return of all class I carriers in the Southern Region for 1942 was 6.41 per cent (Pr. 319). And this excessive rate of return after taxes was earned when the taxes for 1942 were 5.24 times the taxes for 1936. These figures include the weak lines with the strong. Page 6 does not show the rate of return *before* taxes. (See Exhibit 20—described later—for the rates of return *before* federal income and excess profits taxes for the North Carolina roads.)

The rate of return, 6.41 per cent, is based upon investment in railway property plus cash for working capital and supplies without any deduction for depreciation. If depreciation had been deducted from investment, the rate of return, even after taxes, would have been considerably in excess of 6.41 per cent.

The showing of these facts by Mr. Tassin is conclusive evidence against the carriers' assertion that they need additional revenue.

The striking improvement in passenger operating ratios.

Exhibit 9, page 11 (Pr. 324), compares the freight and passenger operating ratios of six North Carolina lines for the separate years, 1936 to 1942 inclusive. Here again is conclusive evidence of the vast change in conditions, particularly with respect to the vast improvement in the relation of passenger revenues to passenger expenses.

The passenger operating ratio of the A. C. L. dropped from 108 in 1936 to 64 in 1942. The ratio of the Seaboard dropped from 138 to 60; and the ratio of the Southern dropped from 112 in 1936 to 57 in 1942 (Pr. 324).

The improvement in the freight operating ratios was substantial, but far less striking. Comparing 1936 with 1942, the freight ratios were: the A. C. L.'s 67 in 1936 dropped to 51 in 1942; the S. A. L.'s 70 in 1936 dropped to 61 in 1942; the Southern's 62 dropped to 55 in 1942 (Pr. 324).

Especially striking is the fact that the passenger operating ratio of the S. A. L. had dropped to 60 in 1942 which was a point *below* the *freight* operating ratio of 61 in 1942. This means that in 1942 the Seaboard earned *more* money per dollar of expense from its *passenger* traffic than from its *freight* traffic.

The heavy increase in car mile passenger revenues of all types.

Exhibit 9, page 13 (Pr. 326), shows that the revenue per passenger carrying car-mile for coach, sleeping car, parlor and chair car, other passenger revenue and dining and buffet car service of ten North Carolina roads in 1942 was 40.49 cents, and *more than double* their average revenue per passenger carrying car-mile of 15.37 cents for 1936 (Pr. 326). Here again is conclusive evidence of the vastly changed conditions, as reflected in the sharp increase in passenger car mile revenues and car-occupancy.

On the other hand, there was almost no change in the revenue per car-mile derived from other non-passenger carrying cars in passenger trains, namely, baggage, mail, express and milk, as shown on page 14, Exhibit 9 (Pr. 327). The average revenue of ten North Carolina roads from this class of traffic in passenger trains was 25.76 cents per car-mile in 1936 and 25.92 cents in 1942 (Pr. 327). Considered in connection with page 13, this data shows that the vast drop in passenger operating ratios, in 1942 as compared with 1936, was due to increased number of revenue passen-

gers in passenger carrying cars, and not to any increase in baggage, mail, express and milk traffic in passenger trains.

Revenue per passenger-mile.

Page 15 of Exhibit 9 (Pr. 328) shows that the increase in passenger earnings, and drop in passenger operating ratio, 1942, as compared with 1937, was not due to any marked change in the fares, as expressed in average revenue per passenger mile in coaches, other than commutation. The average of 6 North Carolina lines in 1937 was 1.494 cents and, in 1942, 1.56 cents per passenger per mile in coaches (other than commutation).

Page 16 of Exhibit 9 (Pr. 328) shows that the revenue of five North Carolina roads per passenger mile in *parlor and sleeping* cars in 1937 averaged 2.286 cents, which is the approximate equivalent of their interstate *coach* fare of 2.2 cents, which was permitted to become effective on October 1, 1942, without any findings or Report. And even in 1942 the average revenue per passenger-mile in parlor and sleeping cars of five North Carolina roads, was not 3.3 cents, but 2.694 cents (Pr. 328). Those average fares in 1942 of 1.56 cents for coaches and 2.694 cents in parlor and sleeping cars were in effect when the four North Carolina roads experienced such low and greatly improved passenger operating ratios, and such high net revenues from passenger operations.

The high increase in passenger earnings was due primarily to the very large increase in car-occupancy in coaches.

Page 17 of Exhibit 9 (Pr. 329) shows that this vast improvement in passenger earnings was derived principally from coach traffic. The revenue per coach-mile (other than commutation) of six North Carolina roads averaged 22.02 cents in 1937 and 52.44 cents in 1942, an increase of 138 per cent. Since there was practically no change in fares

other than the 10 per cent horizontal increase under Ex Parte 148 in February, 1942, it is plain that this increase of 138 per cent in revenue per coach-mile, 1942 over 1937, was due to vastly increased coach-occupancy, or number of passengers per coach. This is demonstrated on page 31 of Mr. Tassin's Exhibit 9 (Pr. 341), which shows that the passenger miles per coach-mile of the six North Carolina roads increased from an average of 14.74 passengers per coach in 1937 to 33.62 in 1942 and 44.96 for January-July, 1942.

The fact that the greatly increased earnings on passenger traffic were due primarily to the increased occupancy of coaches is supported further by page 18 of Exhibit 9 (Pr. 329), which shows that the average revenue per sleeping and parlor car mile of five North Carolina roads in 1942 was 52.4 cents, which is practically the same as the revenue per *coach* mile of 52.44 for the six North Carolina roads as shown on page 17 (Pr. 329).

In the *1936 Fares Case*, it will be recalled, the Commission found that, due to the much heavier weight of the pullman car than the coach, the cost per pullman-mile is greater than the cost per coach-mile. Therefore, these two pages, 17 and 18 (Pr. 329), show conclusively that the coach passengers per coach at 1.65 cents per mile in North Carolina were paying much more than their share of the large passenger profits and relatively more than the pullman passengers per pullman at 3.3 cents per mile. Stated in another manner, these pages show that the spread between the intrastate coach fare of 1.65 cents and the pullman fare of 3.3 cents in 1942 was entirely too small and that it was the coach traveler who was paying too much at 1.65 cents per mile.

Tax accruals.

Page 19 of Exhibit 9 (Pr. 330) shows the tax accruals of eleven North Carolina roads by years, 1936 to 1942, inclusive. Their aggregate tax accruals for 1942 are shown to have been 607 per cent of those for 1936. The largest year-

to-year increase occurred in 1942 over 1941. The accruals for 1942 were $126,068,803, or nearly three times the figure for 1941 of $47,227,889 (Pr. 330). In view of that heavy increase in 1942 it is all the more remarkable that the carriers earned a higher rate of return after taxes in 1942 than in 1941, and the passenger operating ratio was better (lower) in 1942 than in 1941. The returns of the Class I roads in the Southern region were 6.41 per cent for 1942 and 4.24 per cent for 1941, after federal income and excess profits taxes (Pr. 319).

Increases in hourly wages.

Page 21 of Exhibit 9 (Pr. 332) shows that the hourly compensation of all employees of eleven railroads operating in North Carolina increased 37 per cent, 1942 over 1936. That increase pales into insignificance in comparison with the tremendous increase in passenger net railway operating income for six North Carolina roads shown on page 5 (Pr. 318) from a deficit of $16,426,832 for 1936 to a profit of $26,699,988 for 1942, which takes into consideration increases in wages and all other items of expense.

The net railway operating income of the class I roads in the southern region in 1942, $214,151,928, was about 267 per cent of the figure for 1936, as shown on page 6 of Exhibit 9 (Pr. 319).

Page 22 of Exhibit 9 (Pr. 332) shows that the index of average unit prices of railway materials and supplies including fuel in the Southern Region advanced from 100 in October 1936 to 154 in December 1942. These increases, like those in wages, were far more than overcome by increased traffic, and revenues; and the high increase in net railway operating income, 1942 over 1936, was accomplished notwithstanding the increase in wages and the price of materials. Page 22 (Pr. 332) also shows that the price index of 154 in December 1942 went down to 140 in June 1943.

The heavy increase in passengers per train-mile.

Pages 23 to 26, inclusive, of Exhibit 9 (Pr. 333-336) show revenue passenger miles per train mile of numerous North Carolina roads for the years 1916 to 1942, inclusive, and for January-July, 1943.

The average of the six roads for 1932 was 23.83 passengers, for 1936 was 44.59 passengers and for 1942, 145.85. For January-July, 1943, the average jumped way up to 211.1 passengers, or nearly five times as many passenger miles per train mile in the first 7 months of 1943 as in 1936, and nearly nine times as many as in 1932.

The heavy increases in passenger-miles per car-mile.

Exhibit 9, pages 27 to 30, inclusive (Pr. 337-340) show the number of passenger miles per car mile of eleven roads in North Carolina from 1916 to 1942, inclusive, and the first seven months of 1943.

The average for the six roads in 1932 was 5.89 passengers, in 1936 was 10.31 passengers, in 1942, 23.17 passengers, and in January-July 1943, 30.95 passenger miles per car mile.

This means that there were about five times as many passengers per car in 1943 as in 1932 and three times as many in 1943 as in 1936. This included all types of passenger cars, and mixed and special; and indicates the heavy increase in car-occupancy of all types of passenger cars.

The heaviest increase in car-occupancy was in coaches.

Page 31 of Exhibit 9 (Pr. 341) shows that the passenger miles per coach mile of the six North Carolina roads averaged 14.74 in 1937 and 33.62 in 1942, and 44.96 in January-July 1943. The coach occupancy in 1943 was a little more than three times the coach-occupancy in 1937.

Not only the number of passengers but also the percentage increase was far greater for coaches than for sleeping and parlor cars, as shown by page 32 of Exhibit 9 (Pr. 342). The car occupancy of the pullmans in 1937 of five

North Carolina roads averaged 9.82 and in January-July 1943, 23.06 travelers. The increase in passengers in pullmans was about 135 per cent. The increase in coach occupancy was about 205 per cent.

In view of the Commission's finding in the *1936 Fares Case* that an increase in car-occupancy of less than 1 person would have wiped out the passenger deficit in the East, it is apparent that the increase in car-occupancy of 136 per cent in pullmans and 205 per cent in coaches accounts for the drastic drop in the passenger operating ratios of the North Carolina lines, and in the heavy increases in the passenger net railway operating income.

The increase in car-occupancy in pullmans 1943 over 1942, was heavy; and in coaches, very heavy.

Another important fact is developed by pages 31 and 32 of Exhibit No. 9. The carriers in their statistical data have gone beyond 1942 as to some types of information, and have stopped short with 1942 as to other types of statistics. Their contentions and premises are founded primarily upon the year 1942, averaged in with numerous preceding years. A glance at the last vertical columns of pages 31 and 32 (Pr. 341, 342) will show how great an improvement there was in the first half of 1943 over 1942 in car-occupancy. The average passenger mile per coach mile of six North Carolina roads in 1942 was 33.62, and in January-July 1943, 44.96; and the average in pullmans was 19.45 in 1942 and 23.06 in January-July 1943. The increase in coaches, 1943 over 1942 was about 33 per cent, and the increase in pullmans, 1943 over 1942 was about 19 per cent.

The carriers' Exhibit 9 fails to show the most important factor of all—the expense per passenger mile in coaches.

Mr. Tassin's Exhibit 9 (Pr. 314-341) is a splendid document, illuminating in detail, and thorough in its analysis of the statistics which have a bearing upon passenger fares.

And Exhibit 9 is *almost* complete. It leads us right up to the final step of showing the relation of coach fares to expenses per passenger-mile in coaches in 1942, and stops short. We may be sure that Exhibit 9 would have been made complete, by showing the relation of the carriers' proposed increased coach fares to the expense per passenger-mile, if the showing would have been advantageous to the carriers. The fact that this last and final step does not appear in Exhibit 9 points very directly to the assumption that the reason why Exhibit 9 does not show this last step is because the greatly increased occupancy of coaches has so reduced the expense per passenger mile that the expense is now substantially less than the coach fare of 1.65 cents.

Now let us spell out a few figures by simple arithmetic using the railroads Exhibit 9, to indicate how greatly the increased occupancy of coaches has reduced the unit expense per passenger per mile.

In the *1936 Fares Case* the Commission found (214 I. C. C. page 216) that for the year 1933 in the Southern district, the expense per passenger mile in coaches other than suburban was 3.25 cents, and that the car occupancy in coaches was 8.3 passengers; and that the expense per coach mile was 26.95 cents (214 I. C. C. page 266, Appendix I, table 2.). The expense per coach mile, 26.95, divided by the number of passengers per coach, 8.3, produced the expense of 3.25 cents per passenger mile in coaches. As indicative of the increase in expenses, 1942 over that period, let us take the increase in wages of 37 per cent from page 21 of Exhibit 9, which is probably an overstatement and apply that to the expense per coach-mile in 1933 to arrive at an approximation of the expense in 1942. The expense per coach mile, 26.95, increased by 37 per cent, equals 36.9 cents. Dividing that by the number of passengers per coach, in 1942, 33.63, gives an expense per passenger mile in coaches of 1.10 cents.

Obviously the carriers could not afford to show the expense per passenger mile in view of the heavy increase in

coach occupancy, and therefore, they omitted the expense from Exhibit 9—and that figure was the most important of all to complete the otherwise complete showing which was presented in Exhibit 9.

If we divide the expense, 36.9 cents by the number of coach passengers in January-July, as shown on page 31 of Exhibit 9, 44.96, we arrive at an expense per passenger-mile of 0.82 cents, as compared with the proposed fare of 2.2 cents. How could the carriers justify an increase from 1.65 cents to 2.2 cents when the expense was running say from 0.82 to 1.09 cents?

The carriers' Exhibit 9 provides other data from which the approximate expense per passenger mile in coaches may be readily ascertained by simple arithmetic.

Notwithstanding the absence of any showing in Exhibit 9 (Pr. 315-342) of the expense per passenger mile in coaches, there are data in the Exhibit from which an approximation of the expense can be ascertained by simple arithmetic.

Exhibit 9, page 17, (Pr. 329) shows that the average revenue per coach mile of the six North Carolina roads for 1942 was 52.44 cents. Page 11, (Pr. 324) shows that their passenger operating ratios for 1942 averaged 63.

Multiplying that revenue of 52.44 cents by 63 gives an expense per coach mile of 33.03 cents.

Page 31, (Pr. 341) shows that the coach occupancy of the six roads for 1942 averaged 33.62, and for January-July 1943, 44.96.

Dividing the expense per coach mile of 33.03 cents by the number of passenger miles per coach, 33.62 in 1942, gives an expense per passenger mile in coaches for 1942 of 0.98 cents. That is way below the then existing intrastate fare of 1.65 cents and the then proposed fare of 2.2 cents.

Dividing the expense of 33.03 cents per coach mile by the coach occupancy of January-July 1943, 44.96, gives an expense per passenger-mile in coaches, for the first 7 months of 1943, of 0.73 cents.

It will be noted that there is only a slight difference in the results of the two simple methods of ascertaining the expense per passenger mile in coaches, whether we expand the known 1936 expense per coach mile by the known increase in wages, as representing increased expenses in 1942, which produces an expense per passenger mile of 1.10 cents, or whether we multiply the known 1942 revenue per coach mile by the known passenger operating ratio to get the expense per passenger mile of 0.98 cents. For 1943, the first method produces 0.82 cents and the second method produces 0.73 cents.

The results of the two methods in 1943 are only nine-hundreths of one cent apart—a negligible difference.

These examples in simple arithmetic make it plain why the railroads could not afford, in their Exhibit 9 to show that the expense per coach-mile in 1942 was only 0.98 to 1.09 cents and in 1943, only 73 hundredths to 82 hundredths of one cent, when they were proposing an increase in fares from 1.65 cents to 2.2 cents.

In the railroads' testimony there is no explanation by them why they failed to show the expense per passenger-mile in coaches. The answer is that the expense had dropped from 3.25 cents in 1936 to about 1 cent in 1942 and to less than 1 cent in 1943, due to the greatly increased occupancy of coaches.

Their failure to show the expense per coach passenger-mile is "evidence of the strongest character against them" that the expense is less than one cent and less than half of the fare of 2.2 cents which the federal Commission prescribed as a minimum reasonable fare in the four southern States.

The four North Carolina roads could well afford to make their basic interstate coach fares 1.65, rather than increase the intrastate rates to 2.2 cents.

Mr. Tassin's Exhibit No. 10 (Pr. 342-344) purports to be a "comparative statement of losses". (page 1) The word "losses" is a misnomer. On page 2 he shows what the increased revenue would have amounted to, to 22 respective railroads in the south, in each of the four respective States of Alabama, Kentuck Tennessee and North Caroline for the year December 1, 1942, to November 30, 1943, if the intrastate coach fare had been increased to the interstate basis. The total shown for the 22 roads in four states is $2,420,035. (Pr. 343.)

One page 3, (Pr. 344) he shows what the reduction in passenger revenues would have amounted to for the year December 1, 1942 to November 30, 1943, if the interstate fares had been reduced to the intrastate basis on the respective lines of the Southern Railway System in all of the thirteen states in which its lines operate. Mr. Tassin estimated the "system loss" to be 25 per cent. His use of the word "loss" is a misnomer. What he means is that the swollen and excess profits of the Southern Railway lines would have been reduced by so much. He fails to complete the showing by estimating how much the reduction in profits would have reduced their federal income and excess profits taxes.

The testimony of Mr. Anderson, (Pr. 232) of the A. C. L. and Mr. King of the S. A. L. (Pr. 234) indicated clearly that those lines would be in the 81 per cent to 90 per cent income and excess profits tax bracket in 1943. Therefore, the reduction of 25 per cent in profits, shown by Mr. Tassin, would in all probability represent a tax reduction amounting to about 90 per cent of his estimated reduction in fares to the intrastate basis. Thus the reduction in net income would have been only about one-tenth of the estimated reduction in revenue. The opulent North Carolina lines well could have afforded to reduce their interstate coach fares

to 1.65 cents, without impairing their excessive earnings, and still earned in excess of a fair return, as shown in the testimony for the Price Administrator (Pr. 564).

The Southern roads experienced heavy increases in passenger revenues in 1943 over those in 1942.

Mr. Tassin's Exhibit No. 11 shows, (Pr. 345) for sixteen southern railroads, the percentage increases in freight revenue in 1942 over 1941, and in each of the first 10 months in 1943 over the same months separately in 1942; and like percentage increases in passenger revenue.

Page 6 shows that the A. C. L.'s freight revenue increased 91.4 per cent in 1942 over 1941; and that its passenger revenue for 1942 increased 153.27 per cent over 1941. (Pr. 350)

The exhibit does not add up each of the 10 months of 1943, as compared with the same months of 1942, but it shows that there were very heavy increases both in freight and in passenger revenues in the first 10 months of 1943 over 1942. Here again, the increases in passenger revenues were relatively much greater than the increases in freight revenue. To illustrate, taking July, a month after the 6 per cent horizontal increase in freight rates had been eliminated, the increase in freight revenue, 1943 over the same month of 1942 was 18.41 per cent, and the increase in passenger revenue for that month of 1943, over the same month of 1942 was 78.41 per cent. July was not the month of the highest or the lowest percentage increase in 1943 over 1942 either in freight revenue or passenger revenue. The increases in passenger revenues, month over month, ranged from a high of 121.19 per cent in January to 31.19 per cent in October. This does not mean that October was a small month in 1943. The passenger revenues in October 1943 were substantially greater than in January 1943 or February 1943.

Page 13 of Exhibit 11 (Pr. 357) shows that the L. & N.'s passenger revenue in December 1942 increased 176.11 per

cent over December 1941; and shows increases ranging from 51.61 per cent to 215.88 per cent in passenger revenue in the first 10 months of 1943 over the same respective months of the preceding year—1942.

These showings, as to the A. C. L. and the L. & N. illustrate why many of Mr. Tassin's computations in Exhibit 9 stop with the year 1942. The statistics for the year 1943 made far too prosperous a showing to be presented in any attempt to justify an increase in passenger fares.

Page 17 of Exhibit 11 (Pr. 361) shows like extreme increases in passenger revenues of the S. A. L. 1942 over the year 1941, and for each of the first ten months of 1943 over the same respective months of the year 1942. The increase, December 1942 over December 1941 was 153.82 per cent, and for the 10 separate months of 1943 over the same respective months of 1942 ranged from 20.17 per cent to 114.4 per cent.

Page 18 of Exhibit 11 (Pr. 362) is a like showing for the Southern Railway Company. Its freight increase December 1942 over December 1941 was 31.34 per cent; and its corresponding passenger increase 171.5 per cent. For each of the first 10 months of 1943 it experienced healthy and extreme increases in passenger revenue over the same respective months of 1942 ranging from 24.45 per cent to 189.67 per cent.

The fact that the percentage of increase in October 1943 over October 1942 was next to the lowest of any of the ten months, does not mean that October 1943 was a small month. The passenger revenues in October 1943 of the Southern Railway were greater than in the months of January, February, March, April or September, 1943.

As shown hereinbefore, the increased revenues from coach traffic were much greater than from other forms of passenger traffic, while the revenues from other traffic handled in passenger trains, such as mail, milk and express, remained almost stationary.

These showings in Exhibit 11, (Pr. 345-363) of the extreme increases in passenger revenues in the first 10 months of 1943 over the like months of 1942—present a different picture from the implications of the finding in the federal Commission's Report. (258 I. C. C. at page 140) that:

> "The monthly increases over the corresponding month of the preceding year in the passenger revenues of the railroads of the country, including those in the Southern region *have been quite steadily declining.*"

Exhibit 11 (Pr. 345-363) shows that the passenger revenues of the four North Carolina roads increased greatly in each of the first 10 months of 1943 over the corresponding month of 1942.

The railroads' revenues increased much more than their expenses.

Mr. Tassin's Exhibit 12 (Pr. 364-382) is an illuminating one in that it directly refutes the implication in the federal Commission's report that the year 1942 marked the peak of railroad prosperity and that in 1943 the railroad prosperity was declining month by month.

Exhibit 12 shows for 16 respective railroads in the south the relation between the increased total operating revenues 1942 over 1941, and the increased total operating expenses, 1942 over 1941, and similar comparisons for the first 10 respective months of 1943 over 1942.

A. C. L.

Page 6 of Exhibit 12 (Pr. 369) shows that the A. C. L.'s total operating revenues, December 1942 over December 1941, increased 97.29 per cent, whereas the increase in total operating expenses was only 26.96 per cent. And for each of the first 8 months of 1943 except May the revenues increased at higher percentages than the expenses. In May and September the actual mony-increase in revenue exceeded the actual money increase in expenses. Only in Oc-

tober of 1943 did the actual money increase in expenses exceed the actual money increase in revenues. *But* the Revenues in October 1943, $11,478,160, vastly exceeded the expenses of $6,834,586. And the revenues in October 1943 actually exceeded the revenues in September, 1943.

L. & N.

Page 13 of Exhibit 12 (Pr. 376) shows that the L. & N.'s total operating revenues, December 1942 over December 1941, increased 49.51 per cent, whereas its total operating expenses increased only 23.5 per cent. For each of the first seven months of 1943, through July, the percentage increase in revenues was greater than the percentage increase in operating expenses. In each of the three later months the actual money-increase in revenues was greater than the actual money-increase in expenses.

S. A. L.

Page 17 of Exhibit 12 (Pr. 380) shows that the Seaboard Air Line Railway's operating revenue for December 1942 over December 1941 increased 74.5 per cent, while its expenses increased only 54.19 per cent. For each of the months of January to June 1943 the percentage increases in revenue over the corresponding months of 1942 were greater than the percentage increases in expenses. For July, August, September and October the actual money increase in revenue ran close to the actual money increase in expenses, *but* the revenues in October 1943 were $11,240,211, and the expenses in October were only $6,368,794. The ratio of expense to revenue even in October was as 57 is to 100. In other words, out of each dollar of revenue only 57 cents was needed for expenses.

SOUTHERN RY.

Page 18 of Exhibit 12 (Pr. 381) shows like comparisons for the Southern Railway. Its total operating revenues increased, December 1942 over December 1941 by 48.36 per

cent, whereas its total operating expenses increased only 7.63 per cent.

For each of the months of 1943 through August its percentage increase, 1943 over 1942 was greater in revenues than in expenses. In September the actual money increase in revenue was greater than in expenses, and in October alone did the increase in expenses slightly exceed the increase in revenues. But even in October 1943 the revenues, $20,602,113, were tremendous in relation to the expenses, $11,896,832. The resulting ratio of expenses to revenue is 58. Out of each dollar of revenue only 58 cents was needed for operating expenses for total operations.

The showing made by Mr. Tassin's Exhibits 9 to 12 (Pr. 315-382) of over prosperity of the railroads in 1942, augmented in 1943, is conclusive proof that the railroads *do not need* additional revenue, either from passenger operations, or from over-all or total operations. The statistics presented by Mr. Tassin for the railroads directly refute the finding of the Commission,—that an increase in intrastate fares is "required by respondent carriers to enable them to provide adequate and efficient transportation service, both interstate and intrastate", (258 I. C. C. at page 154).

Witness Anderson, Comptroller of the A. C. L. Railroad, testified that the A. C. L. is paying excess profits taxes; that it was in the 90 per cent bracket for the year 1942, but was able to take advantage of debt retirement and bring it down to 81 per cent. For 1942 it paid federal income tax of $21,600,000 and for 1943 it will run in the neighborhood of fifty-three to fifty-five millions of dollars, all of which, in excess of thirty million, will be excess profits taxes. (tr. 143-144) (*Pr. 232-234*)

He further testified that if the A. C. L. had had the additional revenue from North Carolina Intrastate fares, which is shown on Mr. Tassin's exhibit 10 page 2, to be about $93,084, between 80 per cent and 90 per cent of it would have been paid to the federal government. (tr. 145-146). (*Pr. 234*)

Witness King, statistician for the Seaboard Air Line Railway, testified that the Seaboard in 1943 through the month of November, had accrued federal income, surtax and excess profits taxes of $14,300,000 (tr. 147) and that the Seaboard for 1943 will be in the 90 per cent bracket, but has losses which will permit a postwar refund of 10 per cent, so that the tax accruals are based on 81 per cent. (tr. 159, 160) (*Pr. 234-236*)

Mr. Tassin's Exhibit 10, page 2, (*Pr. 343*) shows that the estimated difference in fares collected by the Seaboard in North Carolina, if the intrastate had been the same as the interstate fares, would have amounted only to $76,548. (*Pr. 343*)

For the L. & N. the amount of the difference is shown as only $24, which is negligible (Pr. 343). The amount of the difference to the Southern Railway is shown as $381,564, so that the Southern is the only one of the four roads which has any substantial interest in the outcome of this proceeding. And the showing that these North Carolina roads are in the highest excess profits tax brackets makes it apparent that 81 per cent to 90 per cent of increased revenue from an increase in North Carolina fares, which they were seeking, went to pay increased federal excess profits taxes.

Railroads are "inappropriate mediums" for the collection of additional excess profits taxes.

An increase in fares to augment federal excess profits taxes should be condemned—not required—by the federal Commission. Increased fares for such purposes lead to improvident and unnecessary spending. In *Increased Railway Rates, Fares and Charges*, 1942, 255 I. C. C. 357 (report on further hearing April 6, 1943) at page 403 Commissioner Joseph B. Eastman in a concurring opinion said:

> "The matter has another aspect, not so fundamental but yet of importance. A considerable number of the railroads are now paying in large amounts, not only

income taxes, but also *excess profits taxes.* Public utility corporations are surely *inappropriate mediums* for collecting taxes of this character from the public which they serve. The fact that such taxes are collectible is always an incentive, also, to improvident or unnecessary spending".

The taxing power rests with Congress, Congress has not delegated the taxing power to the Interstate Commerce Commission. The Interstate Commerce Commission has no legislative or extra judicial power to issue an order commanding the railroads to increase any fares in order that $10 additional revenue may go into the coffers of the railroads for the purpose of paying $9 excess profits taxes to the federal government.

Witness Makinson, General Passenger Agent of the Seaboard Air Line Railway, testified (Pr. 236) that in 1933 the Seaboard began its modernization program of air conditioning and putting reclining seats in coaches; and that there is no difference in the equipment of the *through* trains, interstate and intrastate. (tr. 149) But the later testimony of Inspectors Bowman and Wade shows that intrastate passengers cannot buy tickets on these "through" trains with air-conditioning, and reclining seats, which are reserved. (tr. 205 to 215) (Pr. 270-278)

Mr. Makinson dwelt at length upon the fact that the handling of troop trains is "very expensive and more expensive than the operation of regular daily trains"; that the Seaboard has a large number of military camps on its lines; and that the *"loaded movements of military trains are very remunerative."* (tr. 150) (Pr. 237)

Mr. Makinson's Exhibit 13, page 1, (Pr. 383) illustrates how "it is possible" for passengers to defeat the through published interstate fares by buying a ticket from Raleigh to Monroe, N. C., and another from Monroe to Atlanta, to save 80 cents. Page 2 (Pr. 383) is a similar illustration, and page 3 (Pr. 384) is a simple illustration of the difference between interstate and intrastate fares. (tr. 151, 153)

But the later testimony of Inspector Bowman (Exhibit 18, page 2) (Pr. 398) shows that the Seaboard's Agent at Selma told him that he could not purchase a ticket from Selma to Hot Springs, N. C., and another ticket to Harriman, Tenn., at less than the through interstate fare.

This conforms to Mr. Makinson's testimony that his general office "issued a specific letter to all interline ticket agents, reminding them that it was unlawful to assist a passenger in defeating a through fare by assisting him in making computations and reservations on reserved seat trains and pullman trains". (tr. 152-193) (Pr. 238-239)

Mr. Makinson further testified that there is no land grant mileage on any of the railroads in North Carolina; and that the land-grant deductions would affect only interstate and not intrastate travel. (tr. 164) (Pr. 245)

Witness Barry then furnished a list of tariff references and references to the Official Guide for distances. (tr. 166-167) (Pr. 246)

The railroads failed to meet the burden of proof.

This concluded the railroads' testimony in justification of the proposed 33.3 per cent increase in intrastate fares in North Carolina, over and above the horizontal increase of 10 per cent under I. C. C. Ex Parte No. 148.

No attempt was made by the railroads to prove the expense of coach service. No interstate traveler appeared or testified that the intrastate fares were prejudicial, or discriminatory. No attempt was made to show that the four North Carolina roads are in need of additional revenue. No testimony was offered to show that an increase in fares was needed to enable the four roads to "provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service," as provided in Section 15a(2) of the Interstate Commerce Act. (Appendix A to this brief.)

No proof was presented to justify an increase of 33.3 per cent in the intrastate coach fares, which had been found to

be "not unreasonable or otherwise unlawful" in the 1936 Fares Case and, as increased 10 per cent, "just and reasonable for the future" in Ex Parte 148—(the 1942 nationwide horizontal increase case.)

In these substantial respects the railroads failed to meet the statutory burden of justifying their proposed increase of 33.3 per cent in coach fares in North Carolina. And yet the federal Commission failed and refused to find that the burden was upon the railroads and failed and refused to find that that burden of proof had not been sustained.

The evidence of North Carolina, the traveling public and the Price Administrator in opposition to the proposed 33.3 per cent increase in intrastate coach fares.

The evidence presented by and on behalf of the State of North Carolina, the Charlotte Shippers and Manufacturers Association, the North Carolina Division of the Travelers Protective Association of America and the Price Administrator was directed towards the following major concepts:

We proved that the railroads, in the proceeding upon their application before the North Carolina Commission, had made only a desultory and perfunctory sort of showing, which was wholly deficient, in several primary factors.

We presented certain supplemental statistics to round out those presented by Mr. Tassin for the railroads;

We proved that typical coach travel in North Carolina is in slow trains, in antiquated, uncomfortable and overcrowded coaches and that travel in de luxe air-conditioned coaches, with soft, reclining reserved seats on fast streamlined trains was practically prohibited to North Carolina intrastate travelers; and

We proved that the North Carolina roads, seeking the increase, excluding the weak lines, such as the Clinchfield and the Norfolk Southern, were experiencing unusually low freight operating ratios, and strikingly low passenger operating ratios, which yield them exhorbitantly excessive rates of return on carrier property before federal income

taxes, and excessive rates of return even after federal income and excess profits taxes.

No direct evidence having been presented by the railroads to justify the intrinsic reasonableness of the proposed increased civilian coach fares, other than a mere comparison of the interstate rates with the intrastate rates, which is insufficient (*Florida* v. *U. S.*, 282 U. S. 194, 212), and when the statutory burden of proof was upon the railroads, there was no obligation or burden upon the North Carolina protestants to bring forward any proof bearing upon the intrinsic reasonableness of the then existing coach fares of 1.5 and 1.65 cents which the federal Commission had approved as "not unreasonable or otherwise unlawful" in the *1936 Fares Case*, and, as increased 10 per cent in Ex Parte 148, had been found to be "just and reasonable for the future."

The evidence of the North Carolina protestants went just as far as the exigencies of the situation, and the lack of proof by the railroads, required.

Our evidence proves what we set out to prove; and no evidence was thereafter presented by the railroads to refute the showing made by the North Carolina protestants.

Description of the evidence presented by the North Carolina witnesses.

Judge Fred C. Hunter, an Ex-judge, an eminent member of the bar of North Carolina, and a member of the North Carolina Utilities Commission, described the proceeding before the North Carolina Commission which had been initiated by the railroads, seeking to increase their intrastate civilian coach fares. (Pr. 247-257) Judge Hunter described the desultory nature of the evidence presented by the carriers in support of the intrastate application, and the important deficiencies in the railroads' proof which lead the North Carolina Commission to withhold action upon the railroads' application pending the filing of a petition, by the North Carolina Commission and others, with the fed-

eral Commission, seeking an investigation into the measure of the interstate coach fares under the greatly changed and financially profitable conditions of the carriers.

Heretofore in this Brief, under the title "The Case before the North Carolina Commission" are extracts from Judge Hunter's testimony in the North Carolina case before the federal Commission, I. C. C. No. 29036, and those extracts need not be repeated here. The substance is that the carriers before the North Carolina Commission had failed to justify the increase and failed to overcome the fact that the federal Commission had approved the 1.5 cent basic coach fare in the south during the times of economic depression and financial poverty of the railroads as being not unreasonable or otherwise unlawful; the fact that 10 per cent had been added to the fares to meet increased costs of operation in 1942, both interstate and intrastate; the fact that the federal Commission had found that all existing fares increased by 10 per cent would be just and reasonable for the future; the fact that the railroads, before the North Carolina Commission, had not even plead, but specifically disclaimed, any need of revenue; the fact that the evidence showed that the carriers were in a condition of great prosperity; the fact that no prejudice against interstate commerce had been alleged or shown; the fact that car-occupancy had vastly increased, thereby reducing unit costs per passenger mile, particularly in coaches; and the fact that there was an utter failure to prove the expense per coach mile—the pivotal fact—under the greatly changed conditions. (Pr. 247-257)

The North Carolina Commission wanted the facts. It did not get them from the railroads. It then *sought* the facts from the federal Commission, and filed a petition with the federal Commission (Exhibit No. 14 in I. C. C. No. 29036) (Pr. 384-387) so as to develop the necessary facts, not only as to intrastate coach fares, but as to interstate coach fares as well. (Pr. 252) In so doing the North Carolina Commission proceeded in that manner of comity and

cooperation which is expected of the federal and state Commissions by Congress in Section 13(3) of the Interstate Commerce Act, as follows:

> "The Commission (federal) may confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this part (Part I, railroads) or part III (water carriers) with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission. . . . The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such state authorities in the enforcement of any provisions of this part (Part I) or part III."
> (See Appendix A to this brief.)

The federal Commission peremptorily refused to cooperate in the manner petitioned for by the North Carolina Commission, and others, contrary to the kind of cooperation which Congress expects of the Interstate Commerce Commission.

The North Carolina Commission has done what it should have done. The federal Commission has done those things which it ought not to have done and has left undone those things which it ought to have done.

Witness Nicholson, Director of Traffic of the North Carolina Commission, (Pr. 258) testified that the North Carolina Commission had authorized the discontinuance of certain passenger train services in North Carolina (Exhibit 15, tr. 184) (Pr. 393) on 684 miles of line on four railroads, principally the Southern Railway; that there is no passenger service on the Norfolk Southern's line from Raleigh, N. C. to Charlotte, N. C., a distance of 157 miles; (tr. 185); that the Winston-Salem Southbound, whose entire route is in North Carolina, has offered no passenger service for several years in North Carolina (tr. 185) (Pr. 258).

The elimination of passenger trains on non-paying lines helps to reduce expenses on remaining lines.

Mr. Nicholson's Exhibit No. 16 (Pr. 394), shows the average revenue per passenger mile, by class of service, received by class-I rail carriers in the Southern region during the period January 1941 to July 1943, inclusive. (tr. 187, 188)

The average of interstate and intrastate fares for 1942, including the 10 per cent increase in February and the increase from 1.65 to 2.2 cents interstate on October 1, 1942, was: 1.61 cents per mile in coaches other than commutation, 1.12 in commutation coach traffic and 2.58 cents in parlor and sleeping cars. (Exhibit 16, tr. 187) (Pr. 394)

Mr. Nicholson's Exhibit No. 17 (Pr. 395) shows the composition, both actual and relative, of revenue received from passenger and allied services by the class I rail carriers in the southern region during the thirty-one month period, January 1941 to July 1943, inclusive. (Tr. 187)

Page 2 of Exhibit 17 shows that coach traffic in the southern region is of great importance, compared with commutation, or pullman fares, as a producer of revenue; and that the great increases in passenger revenues, which have so reduced the passenger operating ratios, have been derived from coach traffic. For example, in January 1941 revenue from coaches was 37 per cent of the total; commutation 1.8 per cent of the total; pullmans 37.2 per cent of the total and other passenger revenues 24 per cent. In July 1943 the revenue from coach traffic rose to 60.8 per cent, commutation 2.4 per cent, the revenue from pullmans had declined to 27.5 per cent of the totals and other passenger revenue had dropped to 9.3 per cent (Exhibit 17, page 2.) (Pr. 396).

Page 3 of Exhibit 17 (Pr. 397) shows that the coach revenues in July 1943 were 487.2 per cent of the 1941 monthly average. This tremendous increase in coach travel, as indicated by the revenues, raises a strong presumption that the unit expense per passenger-mile in coaches, 1942 and 1943, has been greatly reduced.

The significant point developed by Mr. Nicholson's Exhibit 17 (Pr. 395-397) is the fact that commutation fares

still amount to an infinitessimal portion of the passenger-travel business in the south, unlike the Eastern District. Exhibit 17 provides an explanation for the logic in the federal Commission's approval in the *1936 Fares Case* of a 1.5 cent coach fare in the Southern region and a 2 cent coach fare other than commutation in the Eastern District.

The number of commutation passengers is negligible in the south, and over half the total in the East, and the commutation fares in the East were lower than the coach fares in the South. In the *1936 Fares Case,* 214 at page 177 the Commission said:

> "Of the total coach revenues for 1933, commutation fares represented 35 per cent in the East, 2 per cent in the South".

And the Commission said that in the U. S. as a whole in 1933 commutation passengers represented 62.8 per cent of the total passengers carried (page 177).

At page 219 the Commission said:

> "the greater portion of the passenger travel on the eastern railroads is now at fares below the basic fares."

The reason is that the commutation fares were much lower than the basic fares. At page 266, Appendix I Table 2 shows that the revenue per passenger-mile from commutation (suburban) coaches in the eastern district was only 1.34 cents, and 2.05 cents in other coaches, as compared with the average coach revenue in the southern district of 1.67 cents, per mile. The lower commutation fares in the eastern district were accounted for by the greater commutation-car occupancy of 29.2 in the eastern district as compared with 12.2 in other coaches. Even at the lower fares the revenue per car-mile in suburban coaches in the eastern district was 39.04 cents, as compared with the lesser revenue of 25.04 cents per car-mile in other coaches, and 23.83 cents per pullman car-mile. In other words, in the east, the commutation travel, with the *lowest* fare of 1.34 cents per pas-

senger-mile produced the *highest revenue* per coach mile, because its car-occupancy was so much greater than that of other coaches or pullmans.

Mr. Nicholson's Exhibit 17 (Pr. 395-397) brings this picture down to date in the south through the first half of 1943 and shows that coach fares other than commutation provided much higher percentages of the total revenue from passenger traffic than any other type of passenger traffic, and that the revenue from commutation traffic in the south was still as negligible in 1941, 1942 and the first half of 1943, as it was in 1933, as reported in the *1936 Fares Case*. In other words, the difference between the relative volume of coach to commutation travel in the south, and coach to commutation travel in the east, which formed the basis of the distinction between the basic coach fares which were approved and prescribed in the *1936 Fares Case*, still existed in 1941, 1942 and 1943, and the differences had been further accentuated in the south by the fact that the coach fares other than commutation in the south in July 1943 provided 60.8 per cent of the entire passenger revenues of the class I roads in the Southern Region.

And this is further fortified by the fact that the coach occupancy in the south on the six North Carolina roads, 44.96 in January-July 1943 (Tassin Ex. 9, p. 31) (Pr. 341) was much greater than the commutation-coach occupancy of 29.2 in the eastern district in 1933 when the commutation fares in the east averaged 1.34 cents. (*1936 Fares Case*, 214 I. C. C. at page 266).

The comparison would justify a reduction, not an increase, in the then existing fare of 1.65 cents per passenger mile in coaches in the south.

Civilian coach fares should not be burdened with the extra-heavy expenses entailed in the movement of troop trains.

Mr. Nicholson, referring to the testimony before the North Carolina Commission and the testimony of Witnesses Blackwell and Makinson in I. C. C. No. 29036, with

respect to the unusually heavy expense of handling troop trains and the large one-way-empty mileage of such trains and the concentration of equipment for such movements, and the giving of preference to troop trains over the movement of all other trains, testified that the extra expense incurred in troop movements should be borne by that type of service which creates it, and such extra expense should not be added to some other service (tr. 190-191) (Pr. 261). (Mr. Makinson's testimony, tr. 150) (Pr. 237-242) (Mr. Blackwell's testimony, tr. 19, 20, 30-31, 33, 35, 40-41, 156, 157, 158) (Pr. 153, 160) Mr. Nicholson's testimony is supported in principle by the decision of this court in *Northern P. R. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585, 35 S. Ct. 429 at page 433, that the outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned.

And yet the federal Commission, disagreeing with that principle said, in the North Carolina Case, (*Alabama Intrastate Fares*), 258 I. C. C. at page 148 that

> "To concede the correctness of this contention might be to impair the effectiveness of the provisions of Section 15a relative to the adequate and efficient railway service and to defeat the national transportation policy as declared in 54 Stat. L. 899, relative to developing, coordinating and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and the national defense . . ."

The Commission failed to explain why the fares for civilian travel in coaches should be burdened with the heavy expenses of troop-train movements, compensation for which is paid to the carriers by the federal government under contract. Civilian coach travelers cannot and do not ride on troop trains.

The objections of the Price Administrator and North Carolina to the evidence relating to the expense of troop train movements, on the ground that the compensation for

troop movements is not in issue should have been sustained. (tr. 15, 30, 31, 36) (Pr. 150, 159, 160, 163)

Certainly there is nothing in Section 15a or the general transportation policy set forth in 54 Stat. L. 899 which conflicts in any way with the doctrine cited from *Northern P. R. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585.

Mr. Nicholson also testified for the Charlotte Shippers and Manufacturers Association, and the point of their protest against any increase in fares for travel in non-reserved seat coaches is that the service in non-reserved seat coaches for intrastate travel is poor and is deteriorating, and that the non-reserved seat coaches are overcrowded and filthy. (tr. 191, 193) (Pr. 261, 262)

Witness B. F. Russell, a resident of Raleigh, and chairman of the Transportation Committee of Post E of the North Carolina Division of the Travellers' Protective Association, testified that the North Carolina Division of that Association has over 3600 members; that the object of the Association is to secure benefits for the members and improvements in service; that the Association does not feel that the war emergency should be used as an excuse for raising fares considering the poor service that is being given. We do not feel that we should be made to pay or rather to be punished for the inferior service that the railroads are furnishing. (tr. 198) (Pr. 266)

Mr. Russell's company has six salesmen traveling within the state of North Carolina who travel principally by train. Cars are already crowded beyond seating capacity. In a coach going from Greensboro to Greenville the screens were out and it was a very unsatisfactory ride. Coming back by Asheville, he was in a coach that was crowded to standing room. The heat was terrific in the coach. If the windows were open the cinders and dust were bad. (tr. 198-199). (Pr. 266, 267)

Most of his trips are within the State. The proposed increase in fares would cost his company more money for

the traveling of his company's men. He has never been able to use a streamlined coach for his journeys in North Carolina. (tr. 209) (Pr. 267)

Mr. Russell was formerly a locomotive engineer for the Southern Railway and has a kindly feeling for the railroads. The expense of travel is a serious item with the traveling man. We do not feel or believe that fares should be increased—certainly at this time. His objection to the increase is based primarily upon the poor quality of service for intrastate travel. (tr. 201) (Pr. 268)

Witness J. C. Bowman, inspector for the North Carolina Utilities Commission made some actual field investigations and inspections of coach-fare travel in North Carolina and prepared reports from his original records. His Exhibit No. 18 covers what happened at different places. (tr. 205) (Pr. 271, 398-400)

Intrastate travelers are denied the use of deluxe coaches on fast trains.

Page 1 of Exhibit 18 (Pr. 398) shows that on December 8, 1943, at the Seaboard Air Line Railway passenger station in Raleigh, N. C., he attempted to purchase a ticket to Hamlet, N. C. for use on either of their streamlined trains, the agent refused to sell him a ticket to Hamlet or to any other point in the State of North Carolina for use on these trains stating that Columbia, S. C., is the nearest point in the direction of Hamlet, N. C., to which a ticket could be purchased for use on the streamlined trains.

No attempt was made by the railroads to refute that testimony. It proves conclusively that intrastate travelers in North Carolina are not permitted to ride on the deluxe trains which are available to interstate travelers.

Travelers are not allowed to defeat the interstate fares.

Page 2 of Exhibit 18 (Pr. 398) is Captain Bowman's report of his investigation at the joint station of the A. C. L. and the Southern Railway at Selma, N. C., on December

8, 1943. The ticket agent stated to Captain Bowman that a ticket from Selma to Harriman, Tenn., based on a combination of fares over Hot Springs, N. C., and Newport, Tenn., could not be purchased for any amount less than $11.74 (the through interstate charge) which includes the Federal tax of 10 per cent.

Page 3 of Exhibit 18 (Pr. 398) shows that upon inquiry of the Agent of the Seaboard Railway at the station in Henderson, N. C., on Decemer 9, 1943, Captain Bowman learned that the streamlined trains do not stop at Henderson but that other trains are scheduled Southbound at 4:15 A. M., 9:90 A. M. and 8:05 P. M. Captain Bowman was quoted a coach fare of $5.97 including Federal tax to Columbia, S. C. He then asked whether it would be cheaper to buy a ticket to Hamlet and rebuy another from there to Columbia, whereupon the Agent stated that if anything the combination basis would exceed the single (interstate) factor fare.

This testimony negatives any assumption that there exists any practice of attempting to defeat the single factor interstate fares by purchasing two tickets.

Slow schedules and disagreeable accommodations in antiquated coaches.

Page 4 of Exhibit No. 18 (Pr. 399) is Captain Bowman's Report on December 21, 1943, of an inspection trip made from Washington, N. C., to Aurora, N. C. He had to spend a night in Washington, to await the schedule of the train, which was to leave early on the afternoon of the next day. The train did not come in until 3 p. m. The train crew shifted cars on the yard until 4 p. m. Captain Bowman was permitted to get on the train. But at 4:30 the porter told him that the train crew had gone to lunch. At about 5 p. m. the train crew came back and shifted cars again until 6:40 p. m. and finally pulled out five hours and forty minutes late, arriving at Aurora at 8 p. m. The coach was made of wood, and had no heat except a stove which was

located in the freight and baggage department, and as a result it was uncomfortably cold. The seats were so filthy with dirt and dust that he had to take a large map out of his brief case and spread it out on the seat to keep from ruining his clothes. From the time he arrived in Washington, N. C., until his trip was completed in Aurora twenty two hours had elapsed. Captain Bowman's report states that it is difficult to imagine a more unsatisfactory condition in the way of transportation for the traveling public and there is little wonder few people wish to use the train. (Pr. 399)

This evidence proves that the service afforded intrastate travelers in non-reserved-seat, slow-scheduled trains in North Carolina is vastly different from the greatly superior service afforded to interstate travelers in reserved-seat deluxe coaches on fast streamlined trains which run *through* North Carolina. The federal Commission in *Eastern Passenger Fares in Coaches*, 227 I. C. C. at page 31, said that passengers receiving such superior service in the special streamlined trains should pay a higher fare than is charged for inferior standard coach service. But the federal Commission ignored the evidence in the North Carolina Case which shows that the intrastate traveler is practically excluded from the streamlined trains with reserved seat coaches and that the service afforded is vastly inferior to the streamlined-reserved-seat interstate coach service.

Non-reserved seat coaches are badly overcrowded.

Captain Bowman further testified that the coaches are so much overcrowded; that it is hard to get a seat; and that he finds people standing in the aisles who are unable to get a seat. (tr. 206) (Pr. 272)

On a trip from New Bern, N. C., to Marion, N. C., he got off at Greensboro and was told by a porter inside that the train going to Marion would be an hour late, something like 2;40, before it would come in. He actually waited a

little more than two hours. When they called the train he tried to get back on the train. It was very much crowded and people were jammed in. He got kind of at the rear end of the crowd and the coach was filled to capacity and the steps and everything. Five or six of them were left out and finally some trainmen noticed them and took them to another coach and crowded them in, two or three coaches ahead, and they rode that way. The aisle was jammed, people sitting even between seats where they had the backs (of the seats) together. They had crawled under there and were sitting on the floor. There must have been a double capacity load there, because there were as many people standing as were seated, and that condition was pretty well the same all the way on up to Salisbury (N. C.) where Captain Bowman changed cars again. He found the trains more or less crowded all the way, especially from Raleigh to Marion. He had to change cars three times in getting from New Bern to Marion,—a distance of about 250 miles. The trip required fifteen hours and a half. They had long delays stopping here and there, at local stations. (tr. 207-208). The conductor made the remark that this is my last time trying to get through the coaches. I don't care if I don't get all the tickets, I can't make it. (tr. 209) (Pr. 273)

There is a vast difference in the quality and value of the services between travel in reserved and travel in non-reserved seat coaches.

The point of this testimony is that there is a vast and wide difference between the value and the quality of service accorded travelers in reserved-seat and travelers in non-reserved-seat coaches. When the seats are reserved, no such overcrowding to double the seating capacity can occur. (tr. 210) (Pr. 274) And yet the federal Commission failed and refused to recognize this important distinction in the quality and hence the value of the two distinct types of passenger service.

Antiquated coaches are used for non-reserved-seat travelers.

Witness C. B. Wade, inspector of the North Carolina Utilities Commission, testified, from original records and notes made on inspection trips of coach travel and conditions in North Carolina, that the type of equipment provided for coach travel in North Carolina is inferior and antiquated. (tr. 212, 213) (Pr. 276) He described a trip from Fayetteville to Wilmington, N. C. on the Atlantic Coast Line, from his report of December 21, 1943, Exhibit No. 19. (Pr. 276, 400) The coaches were heated by coal stoves and lighted by kerosene lamps. It was extremely hot and stuffy on account of poor ventilation. Passengers complained of the bad air and fumes in the car. It was impossible to get the coach warm at the time of starting. The only oil lamp burning in the coach was smoking badly and was about to explode when Mr. Wade called a trainman's attention to the bad odor and fumes from the lamp and he extinguished it with a cloth. It was then necessary to open the door and some of the windows in the coach for ventilation. The glass in the door and windows was dirty. The toilets were without light. The passenger compartment of the express car was equipped with slat benches on each side of one end, this being used for overflow passengers from the regular coach. Both coaches were made of wood. Approximately 106 passengers were handled on the two trips. I think I can safely assume that 75 to 80 per cent of the passengers were local. On the return trip from Wilmington persons were compelled to stand. On the trip going from Fayetteville to Wilmington the express car was also used to take care of the overflow. The distance between Fayetteville and Wilmington is 85 miles. The running time was approximately 3 hours and 45 minutes in each direction. (Pr. 400, 401)

Mr. Wade's testimony presents an average and typical non-reserved seat journey in North Carolina, which is in slow trains, with antiquated wooden coaches, which are

filthy, ill-lighted, and overcrowded. This type and quality of service stands out in sharp contrast to the travel *through* the state of North Carolina on fast, modern, stream-lined trains, in comfortable, not overcrowded, reserved-seat air conditioned coaches. (tr. 214) (Pr. 278)

The extremely high rates of return and extremely profitable operating ratios of the North Carolina roads.

Witness Doris S. Whitnack (Pr. 279), economist of the staff of the Office of Price Administration, presented statistics showing the tremendous increase in net railway operating income of the North Carolina railroads, their extremely high rates of return on investment before federal income taxes, and their extremely profitable operating ratios, both passenger and freight. Her Exhibit No. 20, (Pr. 279) parallels to some extent the statistics presented by witness Tassin for the railroads, and shows conclusively that the railroads were not in need of any additional revenue from their overall operations, or from passenger operations or from intrastate coach fares.

Exhibit 20 page 1 (Pr. 402) shows that the net railway operating income before federal income taxes for the seven Class-1 roads operating in North Carolina increased from $91,478,000 in 1936 to $282,783,000 in 1942, an increase of more than 200 per cent; and $362,211,000 for the 12 months ending October 30, 1943, an increase of 130.3 per cent over the year 1941. (tr. 219) (Pr. 280)

Page 2 of Exhibit 20 shows the freight and passenger revenues of the seven railroads for the years 1936 to 1943 (12 months ending with October 1943) the freight revenues for 1943 were 109 per cent of the 1936 revenues; but the passenger revenues for 1943 were 547.4 per cent of the 1936 revenues. (Pr. 403) In other words, the vast improvement in financial condition of the North Carolina Roads was due to the fact that the freight revenues in 1943 were more than double what they were in 1936—the year of the *1936 Fares Case;* and more important the fact that

the passenger revenues in 1943 were more than *six times* what they were in 1936. In 1942 the passenger revenues were about four times what they were in 1936. These figures included the two weak lines—the Clinchfield and the Norfolk Southern, which were permitted by the North Carolina Utilities Commission to increase their intrastate fares. (Pr. 403)

Page 3 of Exhibit 20 (Pr. 404) shows that the seven roads incurred net operating deficits in passenger service for the years 1936 through 1941; but that in 1942 each of the seven roads, excepting the two weak lines—the Clinchfield and the Norfolk Southern,—earned substantial new railway operating incomes from passenger service.

The extremely profitable passenger operating ratios.

Page 4 of Exhibit 20 shows the freight and passenger service operating ratios of the seven North Carolina roads for the years 1936 to 1942 and for 1943 estimated from the January-September reports. (Pr. 405) The average passenger operating ratios, even including the two weak lines, dropped from 123.6 in 1936 to 63.9 in 1942 and 52.3 in 1943. The average freight operating ratio dropped from 60 in 1936 to 54.7 in 1942 and 54.7 in 1943. The significant fact developed from this page of the exhibit is that the average passenger operating ratio in 1943—52.3—was more favorable for these seven railroads than their freight operating ratio of 54.7. (tr. 220-221) (Pr. 281, 405)

The Atlantic Coast Line passenger ratio in 1943—51.2, nearly equalled its freight ratio, 50.8. The L. & N.'s passenger ratio, 52.5, was better than its freight ratio of 57.1. The Seaboard's passenger ratio, 51.5 was better than its freight ratio of 57. The Southern's passenger ratio, 47.1, was extremely low, and profitable and much better than its freight ratio of 54.6. (Pr. 405)

The point of this evidence is that these four North Carolina roads, whose coach fares are at issue in this proceeding, were making exorbitant profits on their total opera-

tions and were making relatively more profits on their passenger traffic, than on their freight traffic. Under such circumstances it is difficult to understand why the federal Commission in its second, third, fourth and fifth reports in Ex Parte 148 has continued the emergency increase of 10 per cent on the passenger traffic of these southern roads while it has prevented all the railroads from restoring the horiontal increases under Ex Parte 148 on freight traffic.

Page 5 of Exhibit 20 shows the method used in assigning 1943 revenues and expenses to passenger service. (tr. 220) (Pr. 406)

The excessive rates of return on investment.

Page 6 of Exhibit 20 (Pr. 408A) shows that all seven of the North Carolina roads, even the two weak lines, were earning excessive rates of return, before federal income taxes, on various investment bases for the 12 months ended October 31, 1943. (tr. 222) (Pr. 282)

Three methods of computing the rates of return are set forth on page 6. The basis used in column 10 is the net railway operating income before federal income taxes for the twelve months ended October 31, 1943, divided by the sum of investments in railway property used in transportation service shown in column 2 plus cash and materials and supplies as shown in column 5. (tr. 222) This method makes no deduction for depreciation since original investment. (Pr. 282, 408A)

The column 11 basis of computing return showed an average of 18 per cent.

The basis used in computing the rates of return in column 11 is net railway operating income before federal income taxes for twelve months to October 31, 1943, minus rents for leased road and equipment, divided by the net book investment, after deducting the accrued depreciation and accrued amortization of defense projects in column 4, plus

cash and materials and supplies as shown in column 6. (tr 222) (Pr. 282, 408A)

The basis used in computing the rates of return in column 12 is net railway operating income before federal income taxes divided by net book investment plus cash and materials and supplies. Since column 11 and column 12 methods take into consideration the accrued depreciation, and there is only a slight difference between the results in columns 11 and 12, we shall describe the results in column 11 only. (Pr. 282, 408A)

The rate of return before federal income taxes, 1943, (column 11) for the seven North Carolina roads, including the two weak lines, was 18 per cent. The A. C. L.'s rate of return was 22.1 per cent; the L. & N.'s rate of return was 20 per cent; the S. A. L.'s rate of return was 17.6 per cent and the Southern's rate of return was 17.7 per cent. (Pr. 408A)

It is difficult to understand why the federal Commission should find that these North Carolina roads needed increases in revenues "to enable respondents to render adequate and efficient transportation service", (258 I. C. C. page 155) when the Price Administrator showed that they were earning 18 per cent return on investment before federal income taxes, and that their average passenger operating ratio was more profitable than their average freight operating ratio.

Even the weak lines were earning in excess of the standard rate of return.

Page 6 of Exhibit 20 (Pr. 408A) shows that the Clinchfield's rate of return was 45.5 per cent, and the Norfolk-Southern's rate of return was 7.9 per cent—both in excess of the standard rate of return of 5.75 per cent. But Mrs. Whitnack testified that passenger service is unprofitable for those two particular railroads. (tr. 225) (Pr. 284)

It was for that reason that the North Carolina Commission permitted the Clinchfield and the Norfolk-Southern to increase their coach fares, in a supplemental order, after

this showing had been made by the Price Administrator, and even though both weak lines in 1943 were earning, from their overall operations, more than the standard rate of return. Mrs. Whitnack testified that on the overall operations, the seven carriers listed on Exhibit 20 (Pr. 402) *do not need additional revenues.* (Pr. 285)

Page 8 of Exhibit 20 shows the comparative rates of return on various bases for class-I Line-haul railways in the Southern Region for 1937. (Pr. 409)

The carriers' rebuttal evidence.

The short testimony in rebuttal, which was presented by the railroads' witnesses Barry, (tr. 229), (Pr. 286), Hanes (tr. 234), (Pr. 290), Tassin (tr. 236), (Pr. 291), produced no important facts which require comment.

What evidence was covered by the stipulation made at the oral argument?

Doubt and uncertainty exists as to what evidence was made a part of the record by a stipulation, entered into at the oral argument before the Commission, upon the suggestion of the Commission itself.

At pages 21 to 24 (Pr. 410, 411) of the oral argument before the federal Commission in the four consolidated state coach fares cases, is reported a colloquy between members of the Commission and Mr. Bruce, representing the State of Alabama. Mr. Bruce had said that these respondent "southern carriers are showing the largest increases in passenger fares of any of the carriers which serve the State of Alabama." Commissioner Aitchison questioned Mr. Bruce "with respect to the gain that was going on." This was in answer to Mr. Gwathmey's statement, in his argument for the railroads that "I have no doubt that this Commission will feel justified as you did in Ex Parte 148, and taking notice of the current earnings reports of the railroads from which you will see that for a number of months

past there has been a very marked decline." (Argument before I. C. C. page 9) Commissioner Splawn said to Mr. Bruce (Pr. 411): "Do you object—and other counsel and the other carriers object—to the stipulation that we (the Commission) might use in these proceedings the monthly reports of the Bureau of Statistics?" Mr. Bruce answered: "No, sir. As a matter of fact, Mr. Commissioner, I would be very glad to stipulate that as far as I am concerned, as far as our case is concerned, that the Commission should use the Commission's records in regard to earnings." Each party agreed to the stipulation. (Oral argument before the I. C. C. pages 21-24.) (Pr. 411)

Now just what did that stipulation cover? No limitation was placed upon the consideration of "the Commission's records in regard to earnings". No limitation was expressed as to any particular reports covering any particular carriers for any particular period of time.

The Commission itself, in its report in *Alabama Intrastate Fares*, 258 I. C. C. 133, made liberal use of the various statistical reports which are based upon reports of the carriers to the Commission and published by the Commission's Bureau of Statistics. On page 140, (Pr. 78) the Commission said:

> "So, also for the first 10 months of 1943, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument, the increase in the passenger coach revenues of these carriers over the corresponding period of 1942 was 128.5 percent, as compared with an increase of 30.2 percent in the parlor and sleeping-car revenues.
>
> The statistics in the regular monthly reports as made to us by the class I railroads were made a part of the record by stipulation at the oral argument. The latest of such reports now on file with and available to us are for the month of December 1943."

On page 149 (Pr. 89) the Commission said that:

> "Turning to the system figures for the seven principal respondents, following is a comparison of 1942 and

1943, from the record as supplemented by stipulation of counsel at the argument."

and the Commission then recited from the annual reports of the carriers for 1942 and 1943 the revenues, expenses, operating ratios and net railway operating incomes. The Commission then went on to state the "relation of net railway income to investment in railway property including cash, materials, and supplies, for these respondents," and their average rates of return, after Federal income taxes, for the years 1938 to 1942, inclusive.

It is apparent that the Commission understood that the stipulation at the oral argument included the annual reports of the respondent carriers, and the monthly reports of statistics relating to freight and passenger traffic.

And yet, when the affected States sought to show, in their petitions for reconsiderations, from such annual, monthly and statistical reports issued by the Commission that the federal Commission had erred in its statement on page 140 of the report that "the net railway operating income has steadily declined" the federal Commission either refused to consider such statistics from such published reports of the Commission as had been made a part of the evidence by the stipulation at the oral argument, or else, if it considered such statistics, failed and refused to correct its statement that "net railway operating income has steadily declined." (Pr. 79) We sought to show from such reports that in 1943 and the early months of 1944 the gross revenues had greatly advanced, that the passenger revenues had increased much faster than the freight revenues and that the passenger revenues from coach travel were increasing much faster than those from other types of passenger service.

All of these things the federal Commission failed or refused to consider, or if it considered them, it failed to correct its erroneous findings.

North Carolina's petition for further hearing etc., to receive supplemental statistical evidence, etc.

In North Carolina's petition for further hearing, etc., dated April 26, 1944, (Pr. 449) we pointed out (Pr. 452) that "it is now not clear just what statistics were to be covered by that stipulation" at the oral argument; that some of the statistics in the exhibits were for the first six months of 1943, others for the first nine months, others for the first 10 months of 1943 and others for the 12 months ended with October 31, 1944, and that the federal Commission's report contains some statistics for these part-year periods and some for the complete year 1943, whereas other statistics for the complete year 1943 were omitted from the federal Commission's Report. (Petition page 5) (Pr. 452) We pointed out that the federal Commission's report fails to state what were the passenger operating ratios for the North Carolina lines for 1943 but found that the passenger operating ratio of the 12 Alabama respondents in 1943 was lower than for 1942, without showing how much the improvement was or what the ratio was. (Pr. 452)

North Carolina pointed out that the federal Commission's use of the statistics for the month of December 1943 (under the stipulation) lent itself to unfair and incorrect inferences and deductions for the reason that December 1943 was an *atypical* month. (Petition page 6) (Pr. 453) North Carolina petitioned for opportunity to present statistics for the complete year 1943 and the early months of 1944 to prove that the federal Commission's use of the atypical month of December 1943 was unfair. (Pr. 453)

North Carolina sought to show, from these statistics that the operating ratio of the North Carolina respondents showed a further improvement for the complete year 1943, over the complete year 1942; that the carriers net railway operating income in January 1944 was more than Three Million Dollars greater than the figure shown in the Commission's report for December 1943; and that their rail-

roads' expenses in January 1944 were considerably less than in December 1943. (Petition page 8) (Pr. 454)

In view of the uncertainty as to what evidence was to be covered by the stipulation at the oral argument before the Commission, and of the erroneous use by the federal Commission of December, 1943 as pointing the way to a steady decline in railroad revenues, whereas that month was an atypical month, the federal Commission's action in denying the petition to introduce the complete statistics for the year 1943 which should have been considered as within the stipulation, and the early months of 1944 to show that revenues and earnings were increasing in 1944, instead of declining, was arbitrary and unreasonable.

Other grounds upon which reconsideration was sought by North Carolina.

North Carolina's petition for further hearing, etc., presented numerous other grounds for further hearing, reconsideration and reargument, all of which were denied, peremptorily by the federal Commission without any further Report. Since the major points upon which that Petition was based were raised again in the Court below, only a short description of those grounds need be included here.

The primary grounds of the petition were that:

No person complained of the intrastate fares, (Pr. 455) and hence there was no evidence to support the finding of advantage to "persons in intrastate commerce" and prejudice "against persons in interstate commerce," as found by the Commission in its numbered finding 6. (Pr. 96) (Petition page 10, Pr. 455, 456)

The coach fare, of 1.5 cents in the south had been found to be not unreasonable or otherwise unlawful in the *1936 Fares Case*, had been stoutly championed by the Southern Railway, and therefore the burden of proof to justify any increase in that fare, after the 10 per cent increase under Ex Parte 148, rested heavily upon the railroads. (Petition pages 10 to 15 inclusive.) (Pr. 456-462)

The Commission may not lawfully require increases in fares under existing conditions of excessively high earnings as a means of offsetting deficits from passenger operations in past years under different conditions. (Petition pages 20, 21.) (Pr. 463, 464)

The failure of the federal Commission to set forth in its Report the rates of return on investment during the two war years, 1942 and 1943, unduly and unfairly minimizes the effect of the existing and greatly changed conditions. (Petition pages 22-24) (Pr. 465, 466.)

The consideration of rates of return *after* federal income taxes is improper, as found by the Commission in *Reduced Rates, 1922*, 68 I. C. C. 676, 683, and *Increased Rates 1942*, 248 I. C. C. 545, 556. (Pr. 467, 468)

Respondent North Carolina lines' average rate of return was excessive even "after" federal income taxes, (Petition 27-28) (Pr. 469) and respondents are earning excessively high rates of return on investment. (Petition page 32) (Pr. 469, 472)

The increased expenses of passenger operations generally during war-years have been far more than off-set by increases in passenger revenues, hence this is not a "revenue-need" case, (Petition pages 32-33) (Pr. 472, 473)

The federal Commission must consider and base its conclusions upon existing conditions of over-profitable war-years and not upon unprofitable pre-war years, (Petition 37-38) and upon the reasonable expectancy that the period of excessively high railroad earnings will continue for some years. (Petition page 38) (Pr. 477)

The railroads failed to prove the most important single fact of all—the relation of their expenses per passenger mile to their revenues per passenger mile in coaches. (Petition page 38-39) (Pr. 478)

The failure of the railroads to prove that most important fact is evidence of the strongest character against them. (Petition page 40) (Pr. 478, 479)

Sample computations from the statistics, introduced by the railroads, show that the intrastate coach fare of 1.65 cents greatly exceeded the expense per passenger-mile in coaches; and that the expense is less than 1 cent per mile. (Petition 41-44) (Pr. 479)

The only evidence as to the reasonableness per se of the coach fares was a bare comparison with the interstate fare, which is not sufficient. The statistics presented by the railroads point to the fact that the coach fare of 1.65 cents was unreasonably high. (Petition page 43-46) (Pr. 483)

There is no evidence to support the finding No. 4 of preference and advantage to persons or localities. (Pr. 484)

There is no evidence to support the findings No. 5 & 6, of unjust discrimination against interstate commerce, (Petition page 47-48) or any revenue-need under Section 15a(2); or that the intrastate coach traffic "does not bear its fair share of the cost of the service" or "its fair share of the *cost* of maintaining an adequate railway system". *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 586. (Petition 48-51) (Pr. 485, 486) On the contrary, the statistics presented by the railroads and the Price Administrator prove conclusively that the North Carolina respondents are earning excessive rates of return; and that their passenger traffic contributes relatively more of the excess profits than their freight traffic.

North Carolina was denied the opportunity to present its Exceptions to a Proposed Report of the Examiner, or to file a Reply Brief.

North Carolina's Petition for further hearing, etc., of April 27, 1944, (Pr. 449) contained matter which, ordinarily, would be incorporated in Exceptions to the Proposed Report of the Examiner, under the federal Commissions Rules of Procedure. But, at the conclusion of the hearing in the North Carolina Case, the Examiner announced that no Proposed Report of the Examiner would be issued, although a Proposed Report had been issued in the Kentucky,

and Alabama Cases. Request was then made by North Carolina for opportunity to file a reply Brief in the North Carolina Case, and the Examiner refused to permit it, although Rule 93 of the Rules of Practice of the Commission so provide, when no proposed Report is to be issued. (Tr. 243) (Pr. 455)

The denial of the Petition for further hearing, etc. was arbitrary.

In view of the fact that no Proposed Report of the Examiner was issued in the North Carolina Case, in view of the fact that the Examiner denied North Carolina's request to file a Reply to the Railroads' Brief, in view of the many errors of fact and law set forth in North Carolina's Petition for further hearing, etc., after the Report of the federal Commission in the four consolidated State Coach Fare Cases, the federal Commission's refusal to hold a further hearing, refusal to hear re-argument, and refusal even to reconsider its Findings and Order, without any report or finding, or statement of reasons for the denial of the Petition, was arbitrary.

The Petition was denied May 8, 1944, although the federal Commission well knew, from the reports filed with and published by it, and from its supplemental Reports in Ex Parte 148, that the railroads revenues from freight and passenger traffic were steadily increasing and not "steadily declining" as stated in its report in *Alabama Intrastate Fares*, 258 I. C. C. at page 140. (Pr. 79) (See *Increased Railway Rates, Fares, and Charges*, 1942, 255 I. C. C. 357, and 256 I. C. C., 502, the latter decided November 8, 1943, and 259 I. C. C. 159 decided November 12, 1944.) In that Report the Commission said that the passenger revenue of all class I railroads was:

in 1940	$ 416,896,703
in 1941	514,632,532
in 1942	1,028,306,460
in 1943	1,653,000,000
in 1944	1,800,000,000 (estimated).

And the Commission further said that the passenger revenues of southern region railroads amounted to 46 million in 1939, and 283 million in 1943, "an increase of about 516 percent."

Thus in May 1944, when it denied North Carolina's petition for further hearing, etc., the federal Commission undoubtedly knew that the passenger revenues in the southern region had increased tremendously, and were not "steadily declining."

The denial of North Carolina's Petition, and the like petitions of Kentucky, Tennessee, Alabama and the Price Administrator under such conditions, was arbitrary.

The federal Commission did not hesitate long to reopen and reconsider several times, its findings and correct its mistakes, with respect to freight traffic, which it made in the original report in Ex Parte 148. Why was it so unwilling to reconsider its mistakes in the four States Coach Fares Cases?

Description of the types and extent of the evidence tendered to the District Court.

North Carolina's suit to enjoin and set aside the order of the federal Commission was heard before Circuit Judge John J. Parker, and District Judges I. M. Meekins and John J. Hayes, at Fayetteville, N. C., on July 12, 1944.

North Carolina introduced in evidence the entire record made before the Interstate Commerce Commission in I. C. C. 29036, including the Brief of the Price Administrator, North Carolina's Petition for Further Hearing, etc., and the railroads' answer thereto. (Tr. 8-9 before the District Court) (Pr. 114, 115)

North Carolina then tendered photostatic certified copies of monthly and annual reports of the carriers to the Interstate Commerce Commission. Counsel for the Interstate Commerce Commission objected to the receipt of the annual reports. (Pr. 115) He made no objection to the receipt of the monthly reports, conceding that they were included in

the Stipulation made at the oral argument before the Commission. He insisted that all that was covered by the Stipulation was "the monthly statistical reports which had been gotten out since the close of the hearing" before the federal Commission. (Tr. 10 before the District Court.) (Pr. 115) Reference back to the stipulation will show that no such limitation was made in the Stipulation as that contended by Counsel for the federal Commission.

The said monthly and annual reports of carriers to the Federal Commission were received in evidence, subject to further ruling. (Tr. 11 before the District Court) (Pr. 116)

A certified copy of the federal Commission's Rule 93 of its Rules of Practice was tendered and received in evidence. This is the rule which permits reply briefs when no proposed report of the examiner is to be issued. (Pr. 116)

A certified copy of the request made by the North Carolina Commission upon the railroads for certain data, in the cause before the North Carolina Commission, was admitted, subject to further ruling. (Tr. 11-12 before the District Court) (Pr. 116)

An affidavit of Mr. Frank A. Downing, of the North Carolina Commission, which was attached to North Carolina's petition to set aside the federal Commission's Order, and which is an analysis and interpretation of the facts appearing in the said monthly and annual reports of the carriers to the federal Commission, was received in evidence subject to further ruling. (Pr. 116, 117)

Like rulings were made with respect to a like amended affidavit of Mr. Downing, and an affidavit of Mr. H. M. Nicholson, which had been attached to the Petition for the purpose of showing irreparable damage to North Carolina Travelers, unless the Order was enjoined. (Tr. 14) (Pr. 117)

Tender was made of certain Executive Orders on behalf of the Price Administrator, and the District Court ruled that judicial notice would be taken of them and that there was no necessity for introducing them in evidence. Copies

were furnished to the Court for its convenience. (Pr. 117)

Certified copies of certain pages of the Reports of the Interstate Commerce Commission, referred to in the Price Administrator's intervening complaint, were received without objection. (Tr. 14-15). (Pr. 118)

Certified copies of Statement M-100 for the months of August to December 1943, and Statements No. 150 and 250 for the months of July to November 1943, of the federal Commission's Bureau of Statistics and Transport Economics were received without objection. (tr. 15) (Pr. 118)

Like copies of Statement M-100 for the month of June 1943, and for the months of January and February 1944, were tendered. Objection was made on the ground that they were issued "*after the decision of the Commission*". They were received subject to further ruling. The decision of the Commission is dated in March, 1944,—after, not before—the months of January and February 1944. Because of this, there is doubt and uncertainty as to whether the monthly reports of January and February 1944 are in evidence or not. Obviously the report for June 1943 was not subject to that objection, and it should be considered as in evidence, not subject to further ruling.

Counsel for the Price Administrator offered an affidavit, which is similar to the one attached to the intervener's complaint, correcting certain errors in the earlier affidavit, and revising the figures. Objection was made by counsel for the federal Commission, and the affidavit was received, subject to further ruling. (tr. 16-17) (Pr. 119)

Counsel for the federal Commission tendered, for the convenience of the Court, printed copies of the federal Commission's Reports in the *1936 Fares Case*, 214 I. C. C. 174, and in Ex Parte 148—248 I. C. C. 145, 255 I. C. C. 357, and 256 I. C. C. 502, and the supplemental report of May 12, 1944 which, at that time had not been printed. (Pr. 119-120)

He also tendered a copy of the Commission's Order of January 21, 1942 in Ex Parte 148, which order permitted

the horizontal increase of 10 per cent in all then existing passenger fares, without any report or findings of fact. (Pr. 120)

The railroads, in case the affidavits of North Carolina and the Price Administrator should be received, tendered affidavits of J. S. Tassin, and E. H. Oliver, subject to the same ruling. (Pr. 120)

The District Court's ruling upon the evidence.

As to such evidence which the District Court received subject to ruling, the District Court held that

> "We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its competency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record. For the reasons above stated, however, our decision would not be different if this evidence were admitted and considered."

(56 F. Supp. 606, at page 621, (20)). (Pr. 572)

What statistical reports were included and what were excluded.

The holding of the District Court, that evidence not embraced in the record before the Commission is excluded, (Pr. 572) is susceptible to different interpretations as to what *was* embraced in the record before the Commission. Our interpretation of the rulings at the hearing before the District Court and the holding in the decision of the District Court is that the record before the Commission included the following:

(a) the entire record made before the Interstate Commerce Commission including, the brief of the Price Administrator, North Carolina's petition for further hearing and the railroads' answer thereto;

(b) Certified copies of pages of the reports of the Interstate Commerce Commission referred to in the Price Administrator's intervening complaint which were received without objection;

(c) Certified copies of I. C. C. Statement M-100 for the months of August to December, 1943, inclusive, and statements No. 150 and 250 for the months of July to November, 1943, inclusive, of the I. C. C. Bureau of Statistics and Transportation Economics, which were received without objection.

(d) Copy of Statement M-100 for the month of June 1943 which should have been included within the ruling with respect to similar statements for later months of 1943.

(e) Statement M-100 for the months of January and February 1944, the contents of which were used in the petition to the federal Commission for further hearing, etc., and which months were before the date the decision of the federal Commission March 25, 1944.

(f) The photostatic certified copies of the monthly and annual reports of the carriers to the Interstate Commerce Commission which were tendered by North Carolina and the Price Administrator to the District Court and which under our interpretation of the stipulation at the oral argument before the federal Commission were made a part of the record before the Commission. These are the reports which were received by the District Court subject to further ruling at page 11 of the transcript before the District Court.

Our interpretation of the evidence which was excluded by the District Court consisted of:

(a) An affidavit of Mr. H. M. Nicholson to show irreparable damage if the federal Commission's order is not enjoined. The facts in that affidavit were not in the record before the Commission and could not have been there. There was no prior time or opportunity at which such evidence could have been presented. No objection was made to the fact that this evidence was tendered by affidavit.

The witness was present and subject to cross-examination;

(b) The affidavit of Mr. Frank A. Downing, containing an analysis and interpretation of the facts and figures appearing in the monthly and annual reports which were made a part of the record before the Commsision by stipulation. The affiant was present and could have been cross-examined;

(c) Like affidavits presented by the Price Administrator, analyzing and interpreting the facts in the said monthly and annual reports issued by the federal Commission. The affiant was present and subject to cross-examination;

(d) The monthly reports issued by the federal Commission for months later than February 1944;

(e) Affidavits of J. S. Tassin and F. H. Oliver, for the intervening railroads; and

(f) Copy of request made by North Carolina upon the railroads for certain data in the companion case before the North Carolina Commission.

What is in the tendered affidavits.

An explanation must be made of the contents of the tendered affidavits and their nature and purpose in order that the Supreme Court may determine whether or not the District Court erred in excluding them.

It will be recalled that the statistical exhibits of record before the federal Commission were derived from the Annual Reports of Carriers for years prior to 1943, and the cumulative monthly experience of the calendar months through varying periods of 1943. Some pages of the exhibits covered the first 6 months of 1943, others 9 months of 1943, and others 10 months of 1943. Under the Stipulation, made at the oral argument before the federal Commission, the federal Commission also used the month of December 1943. The testimony of the statisticians for North Carolina, the Price Administrator, and the railroads, used in certain instances the current monthly reports of varying cumulative monthly periods of 1943, and

they estimated the results for the complete year 1943 based upon the several cumulative monthly reports which were available when the respective exhibits were prepared.

Exhibit 9 (Pr. 315) p. 4, uses September 30, 1943, and 10 months ended September 30, 1943. (Pr. 317)

p. 26 and 30 use January-July 1943, in comparison with prior complete years. (Pr. 336, 340-342)

Exhibit 10, (Pr. 341), p. 2 and 3 use the year December 1, 1942 to November 30, 1943. (Pr. 342, 344)

Exhibit 11, (Pr. 345), p. 2 and 19 use December, 1942 to October, 1943, inclusive, (Pr. 346)

Exhibit 12 (Pr. 364) p. 2 to 19 inc. use December, 1942 to October, 1943, inc. (Pr. 365-387)

Exhibit 16, (Pr. 394) p. 1 uses January to July, 1943, inc.

Exhibit 17, (Pr. 395) p. 1 uses January to July 1943, inc.

Exhibit 20, (Pr. 401) p. 1 and 2 use 12 months ending October 30, 1943. (Pr. 402-403)

p. 4 uses January-September, 1943, as a means of estimating the year 1943 in comparison with prior years. (Pr. 405)

p. 6 uses 12 months ended October 31, 1943. (Pr. 408A)

North Carolina's Petition for further hearing (Pr. 449) uses January 1944, and the complete figures for 1943 to show that the federal Commission erred in using December 1943 as marking the downward trend in railroad revenues and earnings.

North Carolina's Petition to the District Court (Pr. 1) and the affidavit of Mr. Downing (Pr. 28) use January, February and March, 1944, for the same purpose, to prove that December 1943 was an abnormal month and should not have been used by the federal Commission as definitely marking a downward trend in railroad traffic, revenues, or earnings.

The Price Administrator's Petition to the District Court (Pr. 38) and the affidavit of Mrs. Whitnack (Pr. 54) use the complete year 1943, based upon various annual and monthly reports of carriers to the federal Commission.

The federal Commission in its report (258 I. C. C.) at page 138 uses the "first nine months of 1943" and the 12 months ended October 31, 1943 (Pr. 76)

at page 139 it states the passenger operating ratios for the *year* 1943; (Pr. 77)

at page 140 it uses "the first seven months of 1943"; (Pr. 78)

at page 140 it refers to "the first 10 months of 1943, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument." (Pr. 78)

on the same page of the Report the federal Commission makes the statement, inconsistent with the one just quoted, that "The latest of such reports now on file with and available to us are for the month of December 1943. (Pr. 78)

on page 149 the Commission uses the Statistics from the annual reports for 1943 of revenues, expenses, operating ratios and net railway operating incomes. (Pr. 89)

Having used total 1943 actual figures in its Report, upon what reasoning did that Commission rely to support its objection before the District Court, to the use of the annual reports for 1943 by North Carolina and the Price Administrator? If the Commission used the annual reports for the year 1943, under the stipulation made at the oral argument before the federal Commission, why are North Carolina and the Price Administrator to be denied the use of them?

It is well to explain to the Supreme Court that Statement M-100 (Pr. 118) is a statement of operating revenues and expenses of class I steam railways in the United States, excluding switching and terminal companies, and is issued monthly by the federal Commission. It shows many sepa-

rate primary accounts such as Revenues, divided between Freight, Passenger, Mail and Express; Expenses, divided between Maintenance, Depreciation, etc., Traffic, Transportation and General; total railway operating revenues; total operating expenses; taxes, divided between federal income and other taxes; railway operating income; equipment and joint facility rents; net railway operating income; and ratio of expenses to revenues (operating ratio); all month by month, and region by region, comparing the month of the current year to the same month of the preceding year, on one side of the large sheet. On the other side are like cumulative statistics for the aggregate of the 12 months of the current year with the aggregate of the same months of the preceding year. Thus the December Report of 1943 shows such statistics for the month of December 1943, compared with December 1942, and, on the reverse side, shows like aggregate statistics for the 12 months of the year 1943 compared with the 12 months of the preceding year. The statistics in the December report thus cover the cumulative statistic for the entire year.

Statements M-150 and M-250 (Pr. 118) are made up in like fashion; and the reports for the month of December 1943 show, on the reverse side, the combined passenger traffic statistics for the aggregate 12 months of 1943.

Now, since the federal Commission used the December 1943 monthly reports M-100 and M-250, showing revenues, earnings, ratios and passenger traffic statistics for the various regions from *one* side of the December 1943 monthly reports, why did that Commission object so strenuously to the use of the aggregate 12 months of 1943 which appear upon the reverse side of that report?

Having used the total annual statistics of 1943 in its Report, upon what ground did the federal Commission appropriately object to the use and consideration of the annual reports for 1943 by North Carolina, the Price Administrator, the District Court and the Supreme Court?

The reason for the use of the reports for the early months of 1944.

North Carolina did not contend that the decision should be based upon any one month, or the early months of 1944. It did present to the federal Commission, in its petition for further hearing, the statistics for the early months of 1944 for the purpose of showing the unfairness of the use of December, 1943, an abnormal month. North Carolina's position was and is that the consideration of any one month, particularly the abnormal month of December, 1943, was an unsafe guide; that the Commission should have founded its decision upon the two complete years of 1942 and 1943; and that the federal Commission should take judicial notice of the fact that the war is likely to last a number of years; and that the effects of the war upon rail traffic and revenues will continue to be felt for some years to come.

North Carolina had no opportunity to except to a Proposed Report. Its petition for further hearing was its first opportunity to take exception to the federal Commission's arbitrary use of the abnormal month of December, 1943. The only way to prove that December 1943 was abnormal and not a safe guide in estimating the trend of railroad revenues was to show, from the available reports for the early months of 1944, (prior to the decision of March 25, 1944) that December was abnormal, and that railroad revenues were continually rising in 1944 over 1943, as they had in 1943 over 1942.

Why did the federal Commission before the District Court object to the use of the monthly reports of January and February 1944, when the reports for that month were before the federal Commission in North Carolina's petition for further hearing? Why was it unwilling to admit its mistake in basing the North Carolina decision upon its erroneous deductions based upon the use of the abnormal month of December 1943?

The federal Commission was using current annual and monthly reports in a collateral proceeding under a similar stipulation.

The Commission's order in the North Carolina case was not entered until May 8, 1944. (Pr. 507) Just at that time the same Commission was considering the statistical reports and earnings of the carriers in Ex Parte 148, in which it rendered another report, 258 I. C. C. 455 decided May 12, 1944 prohibiting the railroads from continuing the Ex Parte 148 increase on freight traffic. (See the Commission's Brief dated July 3, 1944, before the District Court in the North Carolina Case.) Thus the federal Commission knew and must have known, when it denied North Carolina's petition for further hearing in May 1944 that December 1943 was an abnormal month, that railroad traffic was increasing and that railroad revenues had continued to increase in 1944 over 1943, as they had continued to increase in 1943 over 1942.

In its Second Supplemental Report in Ex Parte 148, 258 I. C. C. 455, at page 456, the Commission said:

"From the periodical reports filed with us by petitioners, (the railroads), which the parties *stipulated at the original* hearing might be referred to, and considered by us, we have *continued to observe* the trends of traffic and the financial results of respondents' operations. Consideration thereof led us to make and serve an (Supplemental) order April 17, 1944 . . ."

Since the federal Commission made such free and liberal use of the monthly and annual reports of the carriers to the Commission in Ex Parte 148, when the carriers were the petitioners, why was that same Commission so insistent that the annual reports for 1943, and the monthly reports for the early months of 1944 should be excluded from the evidence before the District Court?

The above-quoted extract from the Report in Ex Parte 148 refers to a stipulation which was similar to the stipu-

lation made at the oral argument in the North Carolina case. The purpose of both stipulations was to enable the Commission to "observe the trends of traffic and the financial results of respondents' operations," which were to be gained from viewing the annual and current monthly, and cumulative monthly reports of the carriers to the Commission, as published by the Commission. That is what Commissioner Splawn, and counsel for North Carolina, Kentucky, Tennessee and Alabama, had in mind when the Stipulation was made at the oral argument in the four consolidated State Coach Fares Cases.

The contrasting position of the federal Commission in these two contemporaneous proceedings, indicates an attitude of paternalistic solicitude for the railroads in Ex Parte 148 and an attitude of hostile opposition to the four State Commissions in the State Coach Fare Cases.

The purpose of the affidavits was to substitute actual figures for estimates.

The purpose of the statistics presented in the affidavits of Mr. Downing, (Pr. 28) for North Carolina and Mrs. Whitnack for the Price Administrator, (Pr. 54) was to replace the estimated figures for 1943 with the actual reported figures for 1943 from the annual and monthly reports, all of which were available to the Commission and to the public prior to the decision of the federal Commission on March 25, 1944.

Why should the federal Commission object to the substitution of actual figures for estimated figures? The vigorous objection of the federal Commission to consideration of the actual figures in lieu of estimated figures was arbitrary.

As a matter of fact there is very little difference between the revised figures presented in the affidavits of Mr. Downing and Mrs. Whitnack and the estimated figures, which North Carolina and the Price Administrator used in their exhibits, briefs and petitions for further hearing.

The District Court, in such circumstances erred in excluding any of the tendered affidavits.

The differences between the estimated figures of record, and the revised and corrected figures in the tendered affidavits are small.

Let us compare the revised figures in the tendered affidavits with the figures used in the exhibits of record, the briefs, and the petitions for further hearing.

Operating ratios.

Mr. Downing's affidavit (Pr. 28) shows that, based upon the complete reports for the year 1943, instead of the constructive year 1943, (using reports for the months of 1943 which were available at the time) the passenger operating ratio of these four North Carolina lines averaged 62.55 for the year 1942 and 51.84 for the year 1943. These corrected figures differ very slightly from the passenger operating ratios of 63.9 in 1942 and 52.3 for 1943, (estimated) for the seven North Carolina roads shown on page 4 of Exhibit No. 20 (Pr. 402).

Mr. Downing's affidavit (Pr. 28) also shows the revised actual combined freight and passenger operating ratio of these four North Carolina railroads for 1943; and shows that their combined ratio for freight and passenger was higher than their ratio for passenger traffic. In other words the passenger traffic was yielding relatively more profit in relation to expenses than the freight traffic (Pr. 30). The total combined freight and passenger operating ratios shown in the Whitnack affidavit (Pr. 54) (Table H attached to the Complaint (Petition) of the Price Administrator) (Pr. 56A), for the four North Carolina roads, taken from the annual reports, are the same as those shown in the Downing affidavit. That table in the Whitnack affidavit also shows that the average combined total operating ratio of all class I roads in North Carolina for the year 1943,

56.08%, was less profitable than their average passenger operating ratio of 52 06% (Pr. 56A).

This refutes the finding of the federal Commission that the average freight operating ratio was lower and more profitable in 1943 than the passenger ratio. That was not true of the southern region, or of the average of the four North Carolina roads. The federal Commission failed and refused to correct its mistake.

Return on investment.

Mr. Downing's affidavit (Pr. 30) shows that the average rate of return of the four North Carolina railroads before federal income taxes was 14.23% in 1942 and 18.07% in 1943. These differ slightly from those shown on page 6 of Exhibit 20, as follows:

Ex. 20 p. 6 (Pr. 408A) Col. 11.

	1943	Downing's Affidavit 1943 (Pr. 30)	
A. C. L.	22.1%	20.15%	
L. & N.	20	18.85	
S. A. L.	17.6	16.42	
Sou. Ry.	17.7	17.15	
Avg. of 8 roads	18	18.07	Avg. of 4 roads

Downing's Amended Affidavit (Pr. 520) corrects this average of 18.07% to 18.09%.

It will be noted that in each instance the Downing affidavit using the complete annual reports for 1943, shows a slight reduction in the rate of return of each of these four roads, as compared with the rates of return shown in the Whitnack Exhibit 20, page 6, under a slightly different method of computation. But the revised average of the 4 roads differs very slightly from the average of the 8 roads shown in Exhibit 20, page 6, column 11.

The affidavit of Mrs. Whitnack, using the annual reports for 1943 shows revised rates of return before federal income taxes of these four roads, as follows: (Pr. 56A)

A. C. L.	20.13%
L. & N.	19.76%
S. A. L.	16.23%
Sou. Ry.	16.66%

Thus, Mrs. Whitnack's rates of return vary very slightly from those tendered by Mr. Downing for these respective carriers, and in each instance her revised rates of return are lower than those shown in her Exhibit No. 20, page 6, column 11 (Pr. 408A). (See Table I attached to the complaint (Petition) of the Price Administrator to the District Court.) (Pr. 54)

Expense per coach passenger mile.

Mr. Downing's affidavit (Pr. 29) shows that the expenses per passenger mile in coaches of 0.98 cent for 1942 and 0.81 cent for 1943, which appear in North Carolina's brief dated February 16, 1944, (p. 51) and petition for further hearing (p. 41), (Pr. 479), included 6 North Carolan railroads, whereas, excluding the Clinchfield and the Norfolk Southern, which had been permitted by the North Carolina Commission to increase their intrastate fares, the comparable expenses per passenger mile in coaches for the four North Carolina roads, A. C. L., L. & N., Seaboard and Southern were 0.97 for 1942 and 0.91 for 1943. (Pr. 28)

It will be noted that the substitution of the actual figures for the estimated figures changed 1942 only 1/100 of 1 cent and changed the figures for 1943 only one tenth of 1 cent per passenger mile.

Mr. Downing's amended affidavit (Pr. 519) shows

0.77 cent for 1942
and 0.63 cent for 1943.

North Carolina's position in this proceeding is no different whether we use the estimated expense per passenger mile in coaches shown in the brief and petitions for further hearing or the revised figures shown in Mr. Downing's affi-

davit (Pr. 28, 519) which were tendered to the District Court.

Mrs. Whitnack's affidavit, Table III page 2 and 3 attached to the Amended Complaint of the Price Administrator to the District Court, shows the expenses per coach passenger-mile for 1942 and 1943 as follows: (Pr. 56B)

	1942 p.2	1943 p.3
A. C. L.	0.68 cents per mile	0.61 cents per mile
L. & N.	0.95	0.60
S. A. L.	0.73	0.61
Sou. Ry.	0.75	0.69
Total of 6 Class I roads	0.77	0.63

It will be noted that whether the simple computations in the Brief and Petition for further hearing in the North Carolina Case, or the Downing affidavit, or the Whitnack affidavit is used, the expense per passenger mile in coaches was less than 1 cent in 1942 and 1943, as compared with the prescribed fare of 2.2 cents.

There is a definite reason in this proceeding why the Commission should have granted the petition for further hearing, particularly with respect to the expense per coach passenger mile, and why the District Court should have received the supplemental evidence in the affidavits with respect to the expense per passenger mile.

At the commencement of the hearing before the Interstate Commerce Commission, in defining the issues, the statement was made for North Carolina that since the Interstate Commerce Commission had denied North Carolina's petition to investigate the interstate fares on trains going through North Carolina the reasonableness of the interstate coach fares is not in issue in this proceeding (tr. 14). The Examiner said: (Pr. 150)

> "Well it is before the Commission to the extent that it is a burden resting upon respondents (railroads) to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understand-

> ing. Otherwise it is *not in issue.* It is *not subject to attack* and the parties are at liberty to shown what facts they have and their position on that particular question." (tr. 15)

The Examiner's ruling that the burden rested upon the railroads to establish the reasonableness of the then proposed fares was in accordance with the provisions of Section 15 (7) of the Interstate Commerce Act, hereinbefore referred to;

> "The burden shall be upon the carriers to show that the proposed changed rate, fare . . . is just and reasonable." (See Appendix A to this Brief.)

The carriers made no attempt to show the cost of the coach service in relation to the proposed increase in coach fares from 1.65 cents to 2.2. cents, knowing full well that the burden of proof rested upon them. In fact no evidence whatsoever was presented by the railroads bearing upon the cost or expense of the coach service in relation to the proposed increase in fare from 1.65 to 2.2 cents.

There was no burden upon North Carolina to prove anything with respect to the reasonableness of the interstate fares. The Examiner ruled that that was *"not subject to attack."*

In North Carolina's brief and in oral argument before the Commission the point was stressed that the burden of proof was upon the carriers and that that burden had not been sustained by any showing of the relation of the cost or expense of coach service to the then-existing or then-proposed coach fares. In North Carolina's brief, pages 49-53 inclusive, simple computations from the carriers exhibits of record produced estimated expenses per coach passenger mile of 0.98 cents for 1942 and 0.81 cents for 1943. In its report the federal Commission failed and refused to find that the burden of proof was on the carriers and failed and refused to find that the carriers offered no evidence to show the relation of cost or expense of coach

service to the then existing or then proposed fares under the changed conditions of 1942 and 1943.

The Commission failed and refused to find as requested by North Carolina that the railroads' failure to show the expense per passenger mile in coaches under existing conditions raises a strong presumption of law that if such a showing had been made it would have been disadvantageous to them; and that failure to produce evidence upon this most important single point of proof was due to the fact that the showing would have been against their interest in this proceeding; and that their silence under such circumstances became evidence of the strongest character against them, having failed to produce vitally important facts within their peculiar possession and knowledge. (North Carolina's brief, pages 44 to 46 inclusive and cases cited therein.) *Interstate Circuit* v. *United States*, 306 U. S. 208 at page 225 and 59 S. Ct. 467.

In the Commission's report nothing with respect to this important point, raised and pressed by North Carolina, can be found. The omission of any statement of the contention or any ruling upon it and the failure to take into consideration the expense per coach passenger-mile therein computed by North Carolina from the exhibits of record was arbitrary.

In North Carolina's petition for further hearing, etc. this point was again raised and pressed in like manner (Pr. 478, 479). The Commission denied that petition without any report or finding, leaving the assumption that the Commission overruled our contention that the burden of proof was on the carriers, overruled our contention that the failure of the railroads to produce the expense per coach passenger mile was evidence of the strongest character against them, and refused to take into consideration the vast reduction in expense per coach passenger mile which was caused by the heavy increase in the number of passengers per non-reserved seat coach who traveled in 1942 and 1943.

These same points, that the burden of proof was on the carriers, that they failed to present evidence showing the expense per coach passenger mile, and that their failure to do so was evidence of the strongest character against them, was again presented and pressed before the District Court (Pr. 15). The District Court ignored or tacitly overruled North Carolina upon these points and erred as a matter of law in not ruling as requested by North Carolina.

In the brief, in the petition for further hearing and in the affidavits presented to the District Court, the showing by simple mathematics is made, from the carriers' own exhibits, and the stipulated reports that the expense per coach passenger mile in 1942 and 1943 of the principal North Carolina railroads was less than 1 cent per passenger mile and less than one-half of the proposed fare of 2.2 cents per passenger mile.

Since the federal Commission and the District Court failed to make the requested finding when the burden of proof was upon the carriers, there was no way in which North Carolina could show the unfairness and the arbitrariness of the ruling without presenting and having considered the estimated expenses per coach passenger mile which were set forth in the brief, the petition for further hearing and in the affidavits of Mr. Downing and Mrs. Whitnack which were attached to the petitions to the District Court and which were tendered to the District Court. The showing in the petitions and those affidavits of the tremendous reduction in expenses per coach passenger mile directly supports the point, made by North Carolina, that the failure of the railroads to produce such evidence, which was within their possession, was evidence of the strongest character against them.

Unless North Carolina is permitted to show the approximate expense per coach passenger mile in this way it will be denied the opportunity to establish and develop this point which has been made and preserved throughout these proceedings. The Commission, in the *1936 Fares Case* reported

extensively upon the expense per passenger mile in various types of equipment. Why was that point of proof so important in the *1936 Fares Case* and of such little importance in the North Carolina case that the Commission failed and refused even to mention it in its report?

The District Court erred in excluding the tendered evidence, which was supplemental and corrective, showing the approximate expense per coach passenger mile on the lines of the principal North Carolina respondents.

The point is important for the reason that the facts shown are conclusive against the carriers. By no system of accounting and by no methods of logic could the Interstate Comerce Commission justify an order requiring the railroads to increase the intrastate coach fares of 1.65 cents to 2.2 cents when the expense thereof was less than 1 cent per coach passenger mile.

Why is this most important and vital point of proof as to the reasonableness of the proposed fare of 2.2 cents repeatedly to be shielded from view?

A SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

I. The Federal Commission committed a number of arbitrary acts which, in their entirety, constitute the denial of a full hearing as required by statute.

(See Assignments of Error Nos. I, XIII, XI, XV, XXXV and Points Relied Upon No. 1).

II. Evidence was wrongfully excluded by the District Court.

(See Assignments of Error No. I and Points Relied Upon No. II).

III. a. The railroads failed to sustain the statutory burden of proof to justify their proposed increase, or to show that the intrastate fare was unreasonably low or non-compensatory, or that 2.2 cents per mile represented the lowest cost as provided in Section 15 (a) (2).

b. The evidence conclusively negatives the need of any increased revenue from coach traffic, or revenues from all traffic, and hence the intrastate coach fares did not burden or discriminate against interstate commerce.

(See Assignments of Error Nos. VII, XIV, XV, XX, XXX, XXXII, XXXIII, XXXV, XXXVI and Points Relied Upon Nos. III, IV, V, VI, XI, XII).

IV. Rates of return should be computed before federal income and excess profits taxes.

(See Assignments of Error Nos. VII, XIV, XV, XVIII, XXXII and Points Relied Upon Nos. VIII, IX, XI.)

V. Coach fares cannot lawfully be increased to compensate for deficits from aggregate passenger operations in former years.

(See Assignments of Error Nos. XIX, XXIX and Points Relied Upon No. VII.)

VI. Extra expenses and costs that pertain exclusively to the operation of streamlined trains and the movement of troops were erroneously considered as justification for increase in fares for travel in ordinary coaches.

(See Assignments of Error Nos. V, IX, XXVII, XXVIII and Points Relied Upon Nos. X, XVI.)

VII. The finding of prejudice as between persons is without any evidence to support it.

(See Assignments of Error Nos. VIII, XXI, XXII, XXIII, XXXI, XXXVIII, XXXIX and Points Relied Upon Nos. XIII, XIV, XV.)

VIII. The federal Commission has no power to order an increase in intrastate coach fares simply to bring about "uniformity" with the interstate coach fares.

(See Assignment of Error No. XXV, and Points Relied Upon No. XVIII.)

IX. The evidence does not justify the exercise of federal power over these intrastate coach fares.

(See Assignments of Error Nos. II, III, XXIV, XXVI, XXVII, XXVIII, XXXII, XXXVI, and Points Relied Upon Nos. XVII, XIX, XX.)

ARGUMENT.

Condensed Summary of the Argument.

I. "Full" hearing was denied.

The District Court erred in holding that

> "the Commission reached its conclusion after full hearing and thorough consideration of all questions presented." (56 F. Supp. 606, at pages 617 and 618.)

The federal Commission committed a number of arbitrary acts which, collectively, constitute the denial of a full hearing.

II. Evidence was wrongfully excluded by the District Court.

(a) The District Court erred in excluding evidence tendered to it, including the reports of carriers and the affidavits which supported the Petitions to set aside the federal Commission's Order, and which affidavits consisted primarily of explanations and simple computations of statistics taken from Reports of the federal Commission—(which reports had been stipulated into the record at the oral argument before the Commission)—and which affidavits consisted principally of corrections of like computations which had been made from exhibits of record before the Commission and which prior computations had been previously pressed to the attention of the federal Commission in the briefs, oral argument and petition for further hearing.

The District Courts, in such cases are courts of original jurisdiction, and not appellate tribunals.

(b) Unless the State Commissions are accorded full opportunity to put in evidence before the District Courts their alleged facts to prove that the federal Commission based

its conclusions upon erroneous statements of vital facts, and based its conclusions upon unfounded assumptions of fact; and that the federal Commission failed and refused to hear and consider vital facts which conclusively show that the federal Commission's ultimate conclusions were unfounded and directly contrary to fact, the State Commissions will be denied their day in court to test the accuracy of the findings, or the sufficiency of the evidence before the Commission or the arbitrariness of its act in denying the petitions for further hearing and reconsideration, or whether the facts warrant its usurpation of the power of the States to regulate intrastate commerce.

III. The railroads failed to justify the increase.

(a) The District Court erred in failing to find:

That the railroads had presented to the federal Commission no substantial evidence to sustain the statutory burden of proof upon them to show that their then existing intrastate coach fares under the vastly changed conditions, since the Report in the *1936 Fares Case*, were unreasonably low or non-compensatory;

That the railroads had presented no evidence with respect to the cost of coach service which would sustain the statutory burden upon them to justify the proposed increase in southern coach fares from 1.65 cents to 2.2 cents;

That the railroads had produced no evidence to sustain the burden upon them to prove that such coach transportation, at the proposed increased fare of 2.2 cents, would be provided at the *lowest cost* as provided in Section 15 a(2).

The evidence conclusively negatives the need of any increased revenue from coach traffic, or revenues from all traffic.

(b) The District Court and the federal Commission erred in failing to consider and find that the evidence before and tendered to the federal Commission and the District Court proved the following ultimate facts:

That the four remaining respondent North Carolina railroads' expense per coach passenger mile was 0.77 of one cent for the year 1942 and 0.63 of one cent for the year 1943, (Pr. 519) or less than half of the proposed fare of 2.2 cents, and that the proposed fare of 2.2 cents is grossly extortionate and unreasonably high in relation to the cost, and unreasonably high in relation to the then existing fare of 1.65 cents, and hence the coach traffic in 1942 and 1943 was bearing more than its share of the costs of their total passenger services;

That their average passenger operating ratio in 1943 was lower than their freight operating ratio, and hence their total passenger traffic was bearing more than its share of the costs of their total transportation services; (Pr. 56A, 405, 445) and

That their net railway operating incomes were yielding an average rate of return of 14.16 per cent in 1942 and 18.09 per cent in 1943, (Pr. 518, 520) which are grossly excessive; and their net income from railway operations, *after* federal income and excess profits taxes exceeded the standard rate of fair return;

And hence, that the intrastate coach fares did not burden interstate commerce, or unjustly discriminate against interstate commerce and the North Carolina railroads did not need additional revenue from coach passenger traffic or from their total traffic. These facts show conclusively that there was no warrant for the exercise of federal power over these intrastate coach fares.

IV. Rates of return should be computed before federal income and excess profits taxes.

The District Court and the federal Commission erred in failing and refusing to find that the railroads' rates of return on investment of value of carrier property should be computed by use of the net railway operating income *before*, and not *after* deducting federal income and excess profits taxes; and that the four North Carolina roads' average rates of return so computed were 14.16 per cent in

1942 and 18.09 per cent in 1943 (Pr. 520) and were grossly in excess of the standard rate of fair return of 5.75 per cent; and the District Court erred in failing and refusing to find that this showing by North Carolina and the Price Administrator was conclusive upon this point and warranted a reversal of the finding of the federal Commission that these railroads needed additional revenue to enable them to render adequate and efficient transportation service (See finding No. 5, 258 I. C. C. at pages 154, 155 Pr. 95).

V. Fares cannot lawfully be increased to compensate for passenger deficits in former years.

The District Court erred in failing and refusing to find that the federal Commission's Order unlawfully required increases in coach fares during the years of swollen war-profits, to compensate for deficits from total passenger operations in former lean years.

VI. Troop trains and streamlined trains.

Civilian passengers cannot lawfully be required to pay increased fares for intrastate travel in non-reserved overcrowded seat coaches in slow ordinary trains for the purpose of defraying the extra expenses incurred in the movement of troop-trains, and de luxe streamlined trains which are not available to intrastate travelers.

VII. No evidence of prejudice against persons.

(a) The District Court and the federal Commission erred in finding that the mere difference in fares caused undue and unreasonable advantage and preference of intrastate passengers and undue and unreasonable disadvantage and prejudice of interstate passengers; and

(b) The District Court erred in failing and refusing to find that proof of a mere difference in fares is not sufficient; that no interstate traveler alleged or testified that he was prejudiced by the difference in fares; and that, in the total absence of any definite and certain proof of injury

to persons, the federal Commission's finding of undue prejudice and disadvantage to persons cannot be sustained.

VIII. Uniformity.

The federal Commission has no power to order an increase in intrastate coach fares simply to bring about "uniformity" with the interstate fares.

IX. The evidence does not justify the exercise of federal power over these intrastate fares.

The District Court erred in sustaining, and in itself applying, erroneous rules of law and principles which were applied by the federal Commission; and in failing and refusing to find that the federal Commission's ultimate findings are not supported by substantial evidence; and in failing and refusing to find that there is no evidence which justified the exercise of the federal authority over the intrastate coach fares; and in failing and refusing to set aside the federal Commission's Order; and in denying the relief prayed for.

The type of case presented here.

There are aspects of the case presented here which are novel, and which differ from any previous case which has been found in the Supreme Court's Reports.

This is a "Section 13 Case" in which the regulatory power of the State of North Carolina over common-carrier railroads engaged in intrastate commerce in North Carolina has been overthrown and automatically set aside by the Order of the Interstate Commerce Commission which order compels certain railroads to increase their intrastate civilian coach fares in North Carolina.

This case reaches the Supreme Court through the accustomed procedural steps. The case began before the North Carolina Commission, on the application of the North Carolina railroads, and was renewed before the Interstate Commerce Commission, which held a hearing, heard oral argu-

ment, made its findings, denied petitions for further hearing, and entered its Order. A special district court of 3 judges refused to set aside the Order of the federal Commission. North Carolina and the Price Administrator appealed to this Court to reverse the District Court.

Our first Point — that a full hearing was denied — is founded upon a collection of varied incidents, each of which, if viewed separately, may be so hedged about by technicalities as to escape the condemnation of the Supreme Court, but all of which, when viewed collectively, and "in their entirety" amount to an "abuse of administrative discretion" and a "clear showing that the limits of due process have been overstepped". Arguments, that full hearings have been denied, are frequently made and infrequently sustained in cases challenging Orders of the Interstate Commerce Commission, but in no reported case have we found such a succession of incidents as are presented in this case, the cumulative effect of which so clearly shows that the limits of due process have been overstepped. The plea that the Supreme Court view the real substance of the *cumulative effect of these incidents* "in their entirety" is novel.

Our Second Point—that the District Court erred in excluding the evidence tendered to it including the affidavits accompanying the Petitions to set aside the Order of the federal Commission—raises a question of law in a way which, as far as we can find, has not been presented to this Court. There have been cases attacking Orders of the federal Commission in which the question has been raised as to whether a trial de novo may be had. In some types, such as Orders for the payment of money and suits to enforce rate Orders of the federal Commission, trial de novo is the accepted practice (Note 1 below). In others, additional

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Note 1.

Orders for the payment of money and orders to enforce orders of the federal Commission:

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. 925, affirmed 162 U. S. 184.

Missouri Pac. Ry. Co. v. *Ferguson Sawmill Co.*, 235 Fed. 474.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.*, 37 Fed. Rep. 567.

Interstate Com. Com'n v. *Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 295.

evidence, by affidavits and otherwise has been tendered to and accepted by the Courts depending upon the circumstances (Note 2 below). In other cases the doctrine has been applied, although with no statutory compulsion, that cases before the District Courts, where an Order of the federal Commission is assailed, must be tried upon the record made before that Commission (Note 3 below).

The federal Commission, our adversary, invokes that doctrine in this case. The reason for its non-application here will be made clear. It is, briefly, that, the federal Commission used an abnormal month of December, 1943, as a guide in predicting the early downfall of the excessive earnings of the carriers; no opportunity was afforded to North Carolina to prove how wrong and unreasonable and arbitrary that was. The Commission failed and refused to reopen the case for that purpose and for the purpose of inquiring into the costs of the non-reserved seat coach serv-

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Note. 2

Cases in which additional evidence by affidavits or otherwise has been tendered and received.

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457, 38 S. Ct. 383.

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 73 Fed. Rep. 409.

Interstate Commerce Commission v. *Chicago, B. & Q R. Co.*, 94 Fed. Rep. 272.

Western New York & P. R. Co. v. *Penn Refining Co.*, 137 Fed. Rep. 343, 353, 70 C. C. A. 23.

Interstate Commerce Commission v. *East Tennessee & V. & G. Ry. Co.*, 85 Fed. Rep. 107.

Missouri, K. & T. Ry. Co. v. *Interstate Commerce Commission*, 164 Fed. 645.

State of Florida v. *United States*, 31 Fed. 2d 580.

Mississippi Valley B. Line Co. v. *United States*, 292 U. S. 282, 54 S. Ct. 692.

Railway Express Agency v. *United States*, 6 F. Supp. 249, 293 U. S. 532, 55 S. Ct. 212 (dismissed for want of jurisdiction.)

Arkansas Railroad Commission v. *Chicago R. I. & P. R. Co.*, 274 U. S. 597, 47 S. Ct. 724.

State of New York v. *United States*, (Lehigh Valley) 257 U. S. 591, 42 S. Ct. 239.

Shinkle, Wilson and Kreis Co. v. *Louisville & N. R. Co.*, 62 Fed. Rep. 690.

Note 3.

Cases which have been confined to the record before the Commission.

Louisiana and P. Ry. Co. v. *United States*, 209 Fed. 244

Interstate Commerce Commission v. *Lehigh Val. R. Co.*, 49 Fed. Rep. 177.

ice under existing and greatly changed conditions; and failed and refused to report, or examine, or consider the fact that the expense per coach passenger-mile under existing changed conditions was far below the then existing intrastate coach fare of 1.65 cents due to the vast increase in average coach-occupancy; and failed and refused to consider actual figures for 1943 in lieu of the various estimates for 1943 statistics which were employed in the exhibits of record when the figures for the entire 12 months period of 1943 were available by stipulation made at the oral argument.

Under these circumstances there was no way in which North Carolina and the Price Administrator could prove their allegation of arbitrariness without the production of the statistics which showed how unreasonable the Commission was not to hold a further hearing, correct its own mistakes, and reconsider its ultimate conclusions in the light of actual facts. The rejection by the Court of evidence to show these things, which the Commission prevented us from placing of record, would make the federal Commission the sole arbiter of what evidence it receives and considers. The holding of the District Court upon this point would mean that the federal Commission "had a power possessed by no other officer, administrative body or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat." (*Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 at page 186).

Our Third Point—that the federal Commission had found that the coach fares in the south were not unreasonable in the past and would be just and reasonable for the future—and that certain railroads had failed to justify the proposed increase in coach fares, and that the evidence conclusively proves that these railroads were not entitled to and did not need the proposed increase in coach fares—our Third Point—is founded upon facts and circumstances which are dis-

tinctly novel, and set this case apart from any previous Section 13 cases before this court.

Our Fourth Point—that rates of return should be computed before deducting federal income and excess profits taxes—is not new in principle—but is of grave national importance. This Court has decided this Point in principle, with respect to utilities other than railroads. The federal Commission has decided this Point (in our favor) in two major investigations before it, but failed and refused to follow its own decisions when asked to do so in these Coach Fares Cases, and the federal Commission even refused to set forth in its findings of fact what rates of return before federal income and excess profits taxes these North Carolina railroads were earning in 1942 and 1943, although such rates of return are set forth in the exhibits of record before the Commission.

The District Court, although requested so to do by the Price Administrator and North Carolina, refrained from stating such rates of return and failed and refrained from deciding the Point and even refrained from mentioning the fact that the Point had been pressed upon it by the Price Administrator and North Carolina.

It is in the public interest that this question be determined by the Supreme Court in this proceeding.

Our Fifth Point—that the federal Commission, without lawful authority, ordered an increase in intrastate coach fares to an extortionate level under existing conditions of war-born prosperity, as a means of recouping losses from passenger traffic in the former lean years of a bygone era of national economic depression—goes to the root of the fundamental concepts which permeate the entire Report of the Commission, and the Report of the District Court. The Report of the District Court expressly, and at length, holds that carriers may, under changed economic conditions, when the trend of earnings is towards war-born profits, recoup the losses incurred in the bygone era of economic

depression. This question is not new in principle and our point of law is founded upon principles applied and stated by the Supreme Court, but its application here is novel in that, in no previous reported case have we found an attack upon a federal Commission's order requiring increases in any federal Commission prescribed charges when the carriers were earning a rate of return of 18 per cent. That circumstance is so novel that it is glaringly conspicuous to those who, up to this time, have labored under the impression that the fundamental purpose of the Act to Regulate Commerce was to prevent the railroads from earning excessive rates of return. We venture the prediction that no Congress has ever expected its creature, the Interstate Commerce Commission to so forget its fundamental purpose as to prescribe and actually require, by its own order, increases in charges to an unreasonably high level for the purpose of increasing the profits of the railroads when they are earning a rate of return of 18 per cent.

Our Points Six, Seven and Eight are not new, and are founded upon findings of the federal Commission and decisions of the Supreme Court. Point Seven—that there must be definite and certain proof of injury to persons to support a finding of undue prejudice against persons—rests squarely upon specific holdings of the federal Commission sustaining the vigorous arguments on behalf of the railroads themselves.

The treatment of this case by the Commission and the District Court as a general-revenue case instead of a particular fare case has resulted in some strained and untenable reasoning in their Report and Opinion.

We ask particularly that the Supreme Court bear this distinction in mind throughout our argument in order that the Court may appreciate how far afield the Commission and the District Court have gone in the misuse of and misapplication of the principles applicable to general-revenue cases in reaching their conclusions in this particular fare case.

The distinction was clearly stated by the federal Commission itself in *Increases in Intrastate Freight Rates,* 186 I. C. C. 615 at page 620:

> "In the administration of the interstate commerce act a definite class of cases has come to be recognized where the paramount question is the general level of rates throughout the country or in territorial parts thereof, i.e., whether the aggregate revenues of the carriers shall be increased or reduced by a change in this general level. These are known as general revenue cases. For reasons which are apparent, it is impracticable in such proceedings to consider individual rates. It is necessary to deal with rates in the aggregate or by broad classes, and the rights of shippers and carriers with respect to individual rates are protected by a saving clause which makes the general findings without prejudice to subsequent findings in individual situations. The Supreme Court has recognized the practical necessity of dealing with the general rate level in this way. (New England Divisions Case, 261 U. S. 184, at pages 197-198)."

This is not a general nationwide revenue case, but a case relating to one particular type of service performed by passenger trains on particular railroads in a particular region.

The federal Commission, in its Report and the District Court, in its Opinion, have viewed the issues in this case and discussed the evidence in relation to the principles which are usually applied in the consideration of a nationwide general investigation into the collective profits of the railroad transportation system as a whole, and their collective need of revenue to support an adequate transportation system.

This is not that type of case. The issues in this case relate to one of the several kinds of service in passenger car, as distinguished from the various types of service which are rendered on passenger trains, such as pullman berth and parlor car reserved seat service, special deluxe

streamlined reserved-seat coach and extra fare train service, tourist car service, commutation coach service, express service, and the transportation of mail, milk and cream in passenger trains. It relates to non-reserved seat coach service on regular (not deluxe) trains over the lines of only a few railroads which operate within the State of North Carolina. It is in no sense and in no degree a nationwide general-revenue case. For convenience we shall refer to this distinction as between a "particular fare" case and "a general-revenue case." The distinction and the differing principles employed in each have been recognized by the Commission and the Courts.

ARGUMENT.

Supporting the Nine Main Points.

POINT I. A full hearing was denied.

The mere fact that the proceeding was assigned for hearing before an Examiner and the mere fact that some evidence was presented and received does not constitute a "full hearing" which is guaranteed to adversaries before the federal Commission. The mere formality of holding a "hearing" is not sufficient.

> "A full hearing is one in which *ample opportunity* is afforded to *all parties* to make, by evidence and argument, a showing *fairly adequate* to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

Akron, C. & Y. Ry. Co. v. *United States*, 261 U. S. 184, 200, 43 S. Ct. 270, 277. The *New England Divisions* Case.

> "The provision for a hearing implies both the privilege of introducing evidence and the *duty of deciding* in accordance with it. To *refuse to consider evidence* introduced or to make an essential finding without supporting evidence is arbitrary action."

Baltimore & O. R. Co. v. *United States,* 264 U. S. 258, 265, 44 S. Ct. 317, 319, 320. *The Chicago Junction Case.* (In which the New York Central sought to obtain control of terminal railroads at Chicago).

> "Whether the order deprives the carrier of a constitutional or a statutory right, whether the hearing was *adequate* and *fair,* or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power".
>
> "Administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was *inadequate* or manifestly unfair; if the finding was contrary to the indisputable character of the evidence . . . or if the facts found do not, as a matter of law support the order made."
>
> "Manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."

Interstate Commerce Com. v. *Louisville & N. R. Co.,* 227 U. S. 88, 33 S. Ct. 185, 187.

Thus a full hearing is one in which ample opportunity is afforded, by evidence and argument, to make a fairly *adequate* showing, and one which is manifestly *fair,* and one in which the parties know what evidence is offered and *what evidence is considered,* and one in which opportunity is given to *test, explain* and *refute* the evidence considered.

We shall show that North Carolina was not accorded a "full hearing" which meets these requisites.

The Commission committed seven arbitrary acts which, viewed "in their entirety" constitute an "abuse of administrative discretion" and a "clear showing that the limits of due process have been overstepped."

The seven arbitrary acts which show that a full hearing has been denied to North Carolina are set forth in the Statement of the Case and will be enumerated in abbreviated form:

1. The Commission's Hasty Order of August 1, 1942, (Pr. 524), increasing the interstate coach fares of the southern lines from 1.65 cents to 2.2 cents—an increase of 33.3 per cent, over and above the increase of 10 per cent under Ex Parte 148,—was made only two weeks after the carriers' application was filed, and was made arbitrarily, without any hearing, or evidence, or report.

2. The Petitions for Suspension and Investigation of the tariffs, publishing the increases in interstate fares which were approved by the Hasty Order, were denied arbitrarily by the federal Commission without any hearing, or evidence, or report.

3. The Petitions of the several southern states and the Price Administrator to investigate the reasonableness of the interstate coach fare of 2.2 cents, which resulted from the Hasty Order, in view of the greatly changed conditions, and the patent reduction in cost per coach passenger mile due to the drastic increase in non-reserved seat coach-occupancy were denied, arbitrarily, and, likewise, without any hearing, or evidence, or report.

The federal Commission, before the District Court attempted to shield its arbitrary action in denying those petitions upon the technical argument that they were "petitions" and not "complaints", although the statute provides that such complaints shall be brought to the Commission "by petition". Section 13 (1) Appendix A to this brief.

The federal Commission had no statutory authority to deny and dismiss those complaints or "petitions". Section 13 (2) provides that "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant". Appendix A to this Brief. The full hearing guaranteed by Section 15 (1) relates to such complaints "as provided in Section 13". Appendix A to this brief.

The Hasty Order, (Pr. 524) the Petitions for Suspension and the Petitions to Investigate the reasonableness of the coach fares increased under the Hasty Order are not the

subject of direct attack in this Section 13 proceeding, but the findings in the North Carolina, Kentucky, Tennessee and Alabama Cases with respect to the reasonableness of the coach fares in the south, are predicated almost wholly upon the increased fares which resulted from the Hasty Order, the denial of the Petitions for Suspension, and the denial of the Petitions to Investigate the reasonableness of the coach fares.

4. In view of the Examiner's ruling that the reasonableness of the interstate coach fares

> "is before the Commission to the extent that it is a burden resting upon respondents (railroads) to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise it is *not in issue* It is *not subject to attack.*"

(tr. 15); in view of the failure of the railroads to show the cost of the non-reserved-seat coach fare service under the greatly changed conditions, and their failure to sustain the burden of proof; in view of the fact, that therefore the reasonableness of the interstate fares was "not in issue", and "not subject to attack" according to the Examiner's ruling; in view of the fact that the Commission failed and refused to find that the statutory burden was upon the carriers, and that they had failed to sustain that burden, but had relied almost wholly upon the Hasty Order of August 1, 1942; the act of the Commission was arbitrary in making the finding that the interstate fare of 2.2 cents was just and reasonable and that 2.2 cents was the minimum reasonable fare for intrastate travel in non-reserved-seat coaches.

The finding was without any substantial evidence to support it and without the basic findings of fact either in its report in *Alabama Intrastate Fares* (Pr. 69) or in the Hasty Order, (Pr. 524) which are requisite to support such findings. There is an absence of "the basic or essential findings required to support the Commission's order." *State*

of Florida v. United States, 282 U. S. 194, 215, 51 S. Ct. 119, 125.

The Commission erred in relying upon the Hasty Order, which was made without hearing, evidence, findings or report, and which therefore could not form the foundation for "the basic or essential findings required to support the Commission's order."

5. The Examiner's action, in refusing to issue a Proposed Report, whereas the Proposed Report procedure had been allowed and followed in the Kentucky and Alabama coach fare cases, thus denying to North Carolina the opportunity to take exceptions to his findings prior to the final report of the Commission itself, was arbitrary. It is of no moment whether his action was upon his own initiative as agent for the Commission or upon specific instructions from the Commission itself. His act, at the time, was the arbitrary act of the Commission.

6. The Examiner's action in refusing North Carolina the opportunity to file a Reply Brief, which is permitted by Rule 93 of the Rules of the Commission in such cases where no Proposed Report is to be issued, was arbitrary (Pr. 116).

7. The federal Commission's action, in denying the Petitions for Further Hearing, etc., was arbitrary.

North Carolina's Petition showed that the Commission's Report contained misstatements of important facts, and contained deductions which were unfounded and arrived at by unfair processes; and that certain of the Commission's ultimate findings were without evidence or any substantial evidence to support them and contrary to indisputable evidence, and unsupported by the requisite basic findings; and that other findings were contrary to law; and that important findings of fact and law, which had been requested by North Carolina, which would have warranted a reversal of the ultimate findings, were omitted from the Commission's report.

The petition for further hearing also showed the arbitrary acts of the Commission and the Examiner, hereinbefore enumerated, which constituted the denial of a full hearing. No complete re-statement of the grounds of the Petition is deemed necessary here.

Between the date of the Report March 25, 1944 (Pr. 69) and the date of the order, May 8, 1944, (Pr. 509) in the North Carolina case, the federal Commission had before it the statistics of the early months of 1944 which showed that the statistics for the month of December, 1943, upon which the federal Commission leaned so heavily, were unreliable, and did not reflect the actual trend of passenger revenues. The denial of the petition for further hearing, under all of these circumstances, viewed in their entirety, was arbitrary.

The Commission's arbitrary act in summarily refusing to grant that petition and the like petition of the Price Administrator, resulted in the denial to the parties of the opportunity to which they were entitled, to "test, explain or refute" the plain errors of fact and erroneous deductions from unreliable guides, and errors of law which appeared for the first time in the Commission's Report. North Carolina and the Price Administrator had no previous opportunity to "test, explain or refute" the findings in the Report. *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 187.

The cumulative effect of these seven arbitrary acts of the Commission, viewed collectively, "in its entirety" constitutes "an abuse of administrative discretion," and a "clear showing that the limits of due process have been overstepped." *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586, 62 S. Ct. 736, 743.

North Carolina and the Price Administrator have been denied the full hearing to which they are entitled under the Interstate Commerce Act, and the due process clause of the Fifth Amendment to the Constitution.

The hearing, being "not fairly adequate", "inadequate", "manifestly unfair", and the parties having been denied

the right to "test, explain and refute" the errors of fact and law in the Commission's findings and report, the administrative Order, quasi-judicial in character is void. *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct., 185, 187.

The Santa Fe Case.

In *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, 52 S. Ct. 146, the Supreme Court reversed a District Court with directions to grant an injunction sought by the Santa Fe Railway to set aside an order of the Interstate Commerce Commission. The Order prescribed maximum rates for grain and grain products. The Commission's order was held invalid by the Supreme Court on the ground that the Commission had failed to grant rehearing.

The Commission based its findings upon the pre-depression years, whereas the Order was entered to become effective during the economic depression of the early nineteen thirties.

The Supreme Court said:

> "That record (closed in September 1928) pertains to a different economic era, and furnished no adequate criterion of *present requirements*.
>
> "In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to *existing conditions*, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The Order of the Commission which was thus made effective, and the supplemental ensuing order, cannot be sustained."

In these State Coach Fares Cases the Commission based its conclusions primarily upon the statistics of passenger traffic during the prior and bygone years of the economic depression, and dealt with the year 1942—a war year—as an abnormal one, and not entitled to any consideration in the

prescription of coach fares. The Commission seized upon the statistics for the month of December, 1943, to support its prophecy that the peak of war-traffic had been passed and the railroad traffic and revenues were rapidly declining and would soon revert to the depression level. Apparently the Commission mistakenly thought that the war was just about over in December 1943. Now, two years later we know, and the Court may take judicial notice of the fact, that the end of the war looks farther away in 1945 than it did to the Commission in 1943. The Commission's mistake in prophecy was a grievous one.

North Carolina's petition for further hearing sought to present to the Commission the statistics for the complete year 1943 and the current months of 1944, prior to the date of the Commission's Order in May 1944, and to show the unfairness of the Commission's finding that railroad and passenger revenues had passed the peak and were declining to pre-war levels. North Carolina wanted to prove that the freight and passenger revenues were steadily increasing, for the year 1943 as compared with 1942, and for the year 1944 as compared with 1943, in order that the Commission might base its findings upon the existing economic era of war-swollen traffic and swollen railroad profits and rates of return on investment.

The *Santa Fe Case* and the North Carolina case are alike in principle. The difference is that the Commission's order in the Santa Fe case, issued in the period of the depression, was improperly founded upon the statistics for the normal years which preceded the depression of the nineteen thirties, whereas, in the North Carolina case, the Commission improperly founded its decision upon the fact that it had fixed a maximum fare of 2 cents for the East and West in the *1936 Fares Case*, (not for the South) based upon evidence extending through the y ar 1934, and, in the North Carolina Case, the federal Commission failed and refused to recognize that, in 1942, 1943 and 1944, we were living in a "different economic era" of war-born prosperity and vastly

changed and reversed conditions as compared with the bygone era of depression.

North Carolina asks that the Supreme Court reverse the District Court and hold, as it did in the Santa Fe Case, that the Commission's findings, which are predicated upon the statistics of the bygone era of economic depression of the nineteen thirties, "pertains to a different economic era, and furnished no adequate criterion of present requirements"; that the Commission's conclusions are founded upon "conditions which have been radically changed;" and that the cumulative effect of the seven arbitrary acts, viewed "in their entirety", constituted a "denial of right"; and that "the Order of the Commission which was thus made effective, and the ensuing order, cannot be sustained." (Quotations from the Santa Fe Case.)

The opinion of the District Court appears to regard the Santa Fe Case as an exception never-to-be used again, for the reason that it is "restricted to its special facts" and in that it "stands virtually alone." We did not ask for further hearing "on the ground that the record was stale". We did not ask for "a further cost study based on changed conditions". (See the opinion of the District Court, (Pr. 564) citing *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 64 S. Ct. 1129, 1135, and *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 480, 54 S. Ct. 783.) Our petition was founded upon the same principle which was employed by the Supreme Court in the Santa Fe Case, with the exception that the economic trend in the North Carolina Case is in the opposite direction from the economic trend which was considered in the *Santa Fe Case*.

POINT II. Evidence was wrongfully excluded by the District Court.

The District Court held that evidence not embraced in the record before the Commission is excluded. (56 F. Supp. 606 at page 621). (Pr. 572).

The ruling sounds definite enough, but, in its application to the situation presented to the District Court the ruling is vague, indefinite, and susceptible to differing interpretations.

In our Statement of the Case will be found our "Description of the types and extent of the evidence tendered to the District Court," the ruling made at the hearing before the District Court, and our attempt to construe the District Court's ruling on this point.

A list of bulky documentary evidence was tendered to the District Court. Some of it was offered by the federal Commission, some by North Carolina, some by the Price Administrator and some by the railroads.

The District Court's ruling, taken literally, appears to exclude all of the documentary evidence except the transcript of testimony and exhibits which were received in evidence at the hearing before the Examiner. But, did the District Court intend to rule out the briefs, petitions for further hearing, and answers? Did the District Court mean to exclude those documents which were tendered by the Commission, the Price Administrator and North Carolina and received without objection? Did the District Court mean to exclude the certified copies of the monthly reports, which were not in the record before the Commission, but which were not objected to by the Commission? Did the District Court mean to exclude the annual reports of the carriers to the Commission which were objected to by the federal Commission?

We doubt whether the District Court intended to go that far and exclude *all* of such evidence. Therefore we have selected a list of the documents which we thought that the Court *intended* to *receive* in evidence before it and a list of the documents which we thought that the Court intended to exclude.

We shall not repeat here the forty odd pages in our Statement of the Case in which this subject is treated under the topical heading—"Description of the evidence tendered to the District Court."

Our adversaries can be expected to disagree with our interpretation of the ruling; but they cannot afford to stand out for the interpretation that *all* documentary evidence was excluded except the transcript of record before the Commission. If they contend that, then they should be bound to admit that the certified copy of the Commission's order of January 21, 1942 in Ex Parte 148, and the Hasty Order of August 1, 1942, which was tendered to the District Court by the federal Commission (Pr. 521), and which were not in the record before the federal Commission, was likewise excluded by the ruling (tr. 18). Those orders, which are not in the I. C. C.'s published Reports, are the very head and front of the federal Commission's case. Without them the Commission's case falls. Without them there is no basis for the finding with respect to the reasonableness of the interstate coach fares.

The District Court did not resolve the question raised by the federal Commission's objection to the receipt in evidence of the annual reports of carriers to the Commission (Pr. 115). We contended that the Stipulation, made at the oral argument before the federal Commission, included the annual reports, and the federal Commission contended, with no apparent reason, that that Stipulation was confined to "the monthly statistical reports which had been gotten out since the close of the hearing." (tr. 10) (Pr. 115)

Due to the fact that the District Court did not rule definitely upon these questions, which were raised by objections made at the hearing before the District Court, there is doubt and uncertainty as to what the Court excluded.

In *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 187 the Supreme Court said:

> "Manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.
> "All parties must be fully apprized of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect docu-

ments, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding;".

In the *Orient Divisions Case, United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 288-289, 44 S. Ct. 565, 570, the Supreme Court set aside an order of the federal Commission on the ground, not for lack of trustworthiness of the evidence of the character considered but because the railroads were not put on notice

> "of the evidence with which they were, in fact, confronted, as later disclosed by the finding made."

In two respects this principle is applicable here. The Commission in its Report leaned heavily upon the statistics for the month of December, 1943 as marking the end of war-prosperity in railroad traffic and revenues. That was the month in which the hearing was held. Not until the Commission's report was rendered was North Carolina "confronted, as later disclosed by the finding made," with the evidence upon which the Commission predicated one of its most important findings. The principle of the *Orient Divisions Case* applies here.

Again, it was not until the Opinion of the District Court was rendered that North Carolina was confronted with the Court's finding that evidence not of record before the Commission was excluded, and even then, North Carolina did not know and does not yet know definitely what particular evidence is in the record before the District Court and what particular evidence is excluded.

In view of the uncertainty as to what evidence was before the Commission and, now, what evidence is before the District Court, North Carolina asks that the case be remanded to the District Court with instructions to rule upon the question—what evidence was receivable under the Stipulation made at the hearing before the Commission and what evidence, tendered to the District Court, was excluded.

The affidavits, attached to the petitions, and the corrected affidavits, should not have been excluded by the District Court.

Of grave concern is the act of the District Court in excluding the affidavits of witnesses Downing, Nicholson and Whitnack. They were witnesses in the hearing before the federal Commission. They were present at the hearing before the District Court. Their affidavits were necessary parts of the Petitions of North Carolina and the Price Administrator to set aside the federal Commission's Order. Their supplementary affidavits were corrective. No objection was made to the form of the affidavits or the authenticity of the statistics therein set forth. No objections was made to the qualifications of the witness-affiants, and no request made to cross-examine them. The railroads had ample time within which to file like affidavits to rebut the statistics shown in the affidavits, and the railroads did so. Their affidavits, not objected to, were wrongfully excluded also.

The affidavits set forth and explain statistics taken from the reports of the carriers to the Commission which were made a part of the record by the Stipulation made at the request of the federal Commission during the course of the oral argument before the federal Commission. They contain matter which strictly adhered to like statistics which were treated in the testimony, exhibits, briefs, oral arguments and petitions for further hearing.

There was no attempt here to retry the case before the District Court upon new cost studies or newly discovered evidence foreign to the record before the Commission. There was no occasion for the District Court's reference to the doctrine of the *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 54 S. Ct. 786 in which the Supreme Court held that the Commission was not "required to make a further cost study based on alleged changed conditions." In that proceeding, before the federal Commission

—the Chicago Switching Case—the federal Commission directed the carriers to "make a cost study of switching movements in the District." (at page 477, and 784). They did so. In this North Carolina Case the carriers presented *no* cost study. They made no showing of the cost of the coach passenger traffic *at any time*, and under any conditions. That was the significant omission which should have been taken by the federal Commission as evidence of the strongest character against the railroads. The Commission itself failed and refused to consider and to incorporate in its report the simple mathematical computations, presented by North Carolina and the Price Administrator, from the exhibits of record, and largely from the railroads' own exhibits, which proved indisputably that certain of the Commissions ultimate findings were wholly unfounded and unfair. This situation here has no parallel in the situation which was before this Court in the *Chicago Switching Case.*

North Carolina had no previous opportunity to show these facts. The Commission failed and refused to reopen the proceeding to hear and consider these facts. Unless the District Court is required to consider them North Carolina is denied the opportunity to prove the allegations of its Petiiton to the District Court.

In the foregoing Statement of the Case under the caption "What is in the affidavits," we have explained in some detail that exhibits received by the Commission are founded upon statistics for various years, and part-year and full-year computed upon various parts of the year 1943—the year in which the hearing was held; and that one main purpose of the affidavits was to substitute the actual figures for 1943 for the estimated and computed figures for 1943.

What good reason could the federal Commission advance against substitution of actual figures for estimated figures when the actual figures were to be derived from reports stip-

ulated into the record at the oral argument before the Commission?

We explained that the use of the monthly reports for the early months of 1944 in the petition for further hearing and in the affidavits was to prove the unfairness of the use of the month of December by the federal Commission in its Report. North Carolina had no previous opportunity to do so. Why should the federal Commission seek to stand upon its erroneous findings when the true picture was presented to it in the petition for further hearing? And why should not the District Court receive those figures so that it may decide whether the Commission's findings were untrue and unfair, as alleged in the Petition to set aside the Order?

We have explained further that the Commission knew, when it issued its order in May, 1944, that its findings with respect to the unfair month of December 1943 in the *Alabama Intrastate Fares Cases* (Pr. 69) was untrue and erroneous. The federal Commission knew that from its findings in the subsequent reports in Ex parte 148.

Why is the federal Commission afraid to get into this record the true figures for the early months of 1944, prior the entry of its Order in May, 1944?

Can it be that the federal Commission, to save its face in this case, would exert itself to have the true picture excluded from the consideration of the District Court?

We have shown that the revised figures in the affidavits vary only slightly from those presented in the record, the brief, the oral argument and the petition for further hearing before the federal Commission. We have shown the corrected figures which, in some instances are *less* favorable to support our point, and in other instances more favorable to support our point. The corrected rates of return differ so slightly from those in the exhibits presented to the federal Commission at the hearing as to be insignificant.

The corrected expenses per coach passenger mile are slightly lower than those shown in our Brief, Argument and

petition for further hearing before the federal Commission. All are less than 1 cent.

What has been said in summarized form should suffice to show that these affidavits were not "new cost studies", and followed no new lines of attack, and were largely corrective in form and substance, and were in no sense an attempt to "retry the case" in its entirety before the District Court, or to present any new points of argument or fact which had not been presented to the federal Commission before its Order was entered.

There is nothing novel or out of the way in the presentation of evidence in such manner to a District Court in cases attacking orders of the federal Commission.

In the Santa Fe Case, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, affidavits were submitted to the 3-Judge Court to show the effect of the Commission's order upon the carriers' revenues. They were received and considered. The Commission's order was set aside, largely upon the evidence submitted in affidavit form.

In the Citrus Division Case, *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, extensive oral testimony and exhibits were received in evidence before the District Court, and the accounting methods therein contained were considered by the District Court and the Supreme Court when that case came before it.

In the *Citrus Divisions Case, Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 353, 56 S. Ct. 797, 800, the Supreme Court said:

> "The case was tried by three judges. In addition to the evidence given before the Commission there were offered and received at the trial the testimony of many witnesses and much documentary evidence."

The Supreme Court considered the evidence before the District Court, and held that

> "As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the

Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes *due process of law* for its ascertainment."

(at page 364 (805)

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring *due process of law* for its determination.'"

at page 364 (806).

If evidence is properly received in such cases, where the carriers seek to set aside an order of the federal Commission on the ground that the Commission has not accorded to them reasonable rates (in the *Santa Fe Case*) and reasonable divisions of joint rates (in the *Orient Divisions Case*) where the rates and division fixed by the Commission are alleged to be too low, why are the Price Administrator, and states of Alabama, Kentucky, Tennessee and North Carolina denied the right to present competent evidence before the District Court to show that the Commission has fixed coach fares for non-reserved seat travel in ordinary trains which are extortionately high?

Do the railroads have some superior right of protection from orders of the federal Commission which is not to be equally available to the States, the Traveling Public, and the Price Administrator?

Has the power of appointed Commissions in this country ascended to such dizzy heights as to be beyond the reach of the restraining arm of the judiciary?

Is the federal Commission to sit in the future as the sole arbiter and the supreme unchallengeable authority upon questions of evidence which it will receive and consider, and which it will neither receive nor consider?

To sustain the District Court in excluding such affidavits under the circumstances presented here, would mean that the federal Commission

> "had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat"

Interstate Commerce Com. v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 at page 186.

Evidence was wrongfully excluded by the District Court.

POINT III. (a) The railroads presented no substantial evidence to sustain the statutory burden of proof to justify their proposed increase in coach fares.

The railroads, upon whom the statutory burden of proof rested, presented no evidence to show that the intrastate fare of 1.5 cents, which had been approved by the federal Commission in the 1936 Fares Case, as not unreasonable and which, increased by 10 per cent under Ex Parte 148 had been found to be just and reasonable for the future, was unreasonably low or non-compensatory; and no evidence that the fare of 1.65 cents was unduly low in relation to the cost of the service, or that transportation would be provided at the lowest cost, as directed by The Congress in Section 15a(2) at the proposed fare of 2.2 cents.

On the other hand the evidence proves conclusively that the proposed fare of 2.2 cents is grossly extortionate and unreasonably high in relation to the expense per coach passenger-mile of less than 1 cent—63 one-hundredths of one cent (Pr. 519); that the average passenger operating ratio of the four North Carolina railroads, 52, is lower and more favorable to the railroads than their freight operating ratio, 56; and that their average net railway operating income is yielding an average rate of return on investment

of 18.09 per cent, which is grossly excessive (18.09 per cent before federal income and excess profits taxes) (pr. 520).

These indisputable facts prove that the fare of 1.65 cents was not unreasonably low, that passenger traffic is bearing more than its relative share of the cost of the aggregate rail transportation services, and that the railroads do not need additional revenue.

Therefore the Commission's findings—that the intrastate fares are unreasonably low to the extent that they are less than 2.2 cents, that passenger traffic is not paying its fair share of the transportation services, that the North Carolina railroads need additional revenue to enable them to render adequate and efficient service, and that the intrastate fares burden interstate commerce,—all are without any substantial evidence to support them, and are directly contrary to indisputable evidence.

The reasonableness of the fare.

The District Court's reasoning, with respect to the *reasonableness* of the coach fare in affirming the Order of the federal Commission is founded upon erroneous statements of fact and concepts of law.

There was no searching inquiry into coach fares in Ex Parte 148.

The District Court has misconceived the nature of the case, and has confused the principles applicable to general revenue cases and the federal Commission's findings in a general revenue case, with this particular case which concerns one particular type or class of fare on particular railroads in a particular region.

As to the reasonableness of the coach fare, the District Court labored under the misapprehension that

> "The reasonableness of passenger fares was again submitted to a *searching inquiry* by the Commission in its report of March 2, 1942, in Ex Parte 148, wherein,

following certain wage increases and a showing of other increased costs, it approved an increase of 10 per cent in passenger fares and a smaller proportionate increase of freight rates".

The District Court was mistaken. In that general-revenue case there was no "searching inquiry" of passenger *fares*, and no separate inquiry into coach fares. The Commission considered the freight train service and the passenger train service, from the standpoint of the average net railway operating income of the carriers in the nation in the aggregate, as they were about to be affected by wage increases, and the threatened nationwide railroad strike. The federal Commission made no investigation of the costs, per se, of the varied types of transportation performed in passenger-train service. The Commission made no inquiry into the reasonableness of any charges for coach, pullman, extra-fare-train, commutation, express, milk and cream, or mail transported on passenger trains.

Later, in separate particular proceedings, the federal Commission did make searching inquiries into *commutation* fares, but not into ordinary coach fares. (See Statement of the Case, under the caption "Commutation Fares").

The Commission permitted the 10 per cent increase in the then existing charges for the various types of service in passenger trains without *any* inquiry into the inherent reasonableness of any particular charge for any type of service in any region on any particular railroads. The federal Commission made that clear in several portions of its reports. It referred to "The general character of the evidence" and "its necessarily generalized character", and said that "Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs" (248 I. C. C. at page 606); and that "It would be desirable, if feasible, to consider the needs of the railways individually, and to adjust their respective schedules to meet their several needs. The exigencies of the

case do not permit such refinement" (248 I. C. C. at page 609).

What the Commission did was to *permit* a general nation-wide increase in the then existing passenger fares, *whatever they were.*

The federal Commission in that report recited that the coach fares were then "2 cents per mile in the East and West and 1.5 cents in the South" (248 at page 564). It permitted the increase in the South from 1.5 to 1.65 cents, and without any investigation into the inherent reasonableness of the fares or charges for coach service or any other types of service performed on passenger trains.

The District Court mistakenly regarded that proceeding —Ex Parte 148—as a "*searching inquiry*" into the reasonableness of coach passenger fares, which it was not. It was merely a general-revenue case from beginning to end, and the federal Commission, in it, prescribed no rates, charges or fares for any line in any region. The federal Commission made that clear by saying (248 I. C. C. at page 613) that "Rates and charges increased as herein permitted are not prescribed rates and charges . . ."

This North Carolina Case is a *particular case* relating to one *particular type* of service performed in passenger trains, in one region, on a few certain and *particular lines* of railroad.

The District Court failed to give any consideration to the fact that the federal Commission, having found the fare of 1.5 cents "not unreasonable or otherwise unlawful" in the southern region in the *1936 Fares Case*, found in Ex Parte 148 that that fare, increase by 10 per cent to 1.65 cents would be "just and reasonable for the future."

Nowhere in the *Findings* of Fact in *Ex Parte 148* can there be found any basic or essential findings which would indicate that there had been any evidence, or any separate consideration of, or inquiry into, the inherent reasonable

ness of the then existing coach fare of 1.5 cents in the southern region.

Thus the District Court has failed to recognize the important distinctions between a general revenue case—Ex Parte 148,—and a particular fare case—the North Carolina Coach Fare Case.

The District Court has assumed, in error, that the federal Commission in Ex Parte 148, after a "searching inquiry" prescribed 2.2 cents as a minimum reasonable fare per mile for travel, in ordinary non-reserved-seat coaches in the southern region—which was a serious and a grievous error.

The District Court went on to say that the Commission entered other reports in Ex Parte 148-255 I. C. C. 357, and 256 I. C. C. 502,—and refers to the Hasty Order of August 1, 1942 which authorized the additional increase of 33.3 per cent in the interstate fares of certain southern carriers. But the District Court failed to find and to notice that the Hasty Order was entered upon a new and separate application of certain carriers in the southern region, and was granted without hearing, without evidence and without a Report. That application raised new issues which were not raised by the order of investigation in *Ex Parte 148*. The latter related solely to the question whether all of the railroads in the nation should be permitted to make a general increase of 10 per cent in all rates, fares and charges, whatever they were, under the threatened general nationwide strike and increased operating expenses. That special application for an additional increase in the south of 33.3 per cent had no place or part in the General Investigation. Merely giving it that Docket number—Ex Parte 148,—did not bring it within the issues of the general nationwide increase case.

The District Court's error is deep-rooted. It is founded upon a misconception or misapplication of other cardinal principles of law.

The State Commissions had the right to rely upon the findings in the 1936 Fares Case.

The "searching inquiry" was not made in *Ex Parte 148*, but was made in the *1936 Fares Case*. The "searching inquiry" resulted in the continuation, until February 1942, of the fare of 1.5 cents on important railroads in the south, while the fare was 2 cents in the East and West, and differing fares were maintained by individual lines in different regions.

The fare of 1.5 in the southern region was specifically approved and found to be "not unreasonable or otherwise unlawful" after that searching inquiry. The State Commissions permitted the same fare of 1.5 cents to remain in effect, upon the basis of that "searching inquiry" and the findings of the federal Commission. The State Commissions also permitted the 10 per cent general increase in the intrastate fares of 1.5 cents to become effective at the same time as the interstate fares of 1.5 cents were made effective under Ex Parte 148.

The four southern State Commissions withheld their approval of the 33.3 per cent increase in coach fares in 1942 for the reason that the federal Commission, in permitting such increase in the interstate coach fares from 1.65 cents to 2.2 cents, acted upon a separate application of certain Southern railorads, *after* the Report in *Ex Parte 148*, and without any hearing, or evidence, or report upon that separate application which had no place in Ex Parte 148.

The State Commissions "held the line", under the specific emeregency executive Order of the President, issued under his war-powers, and in conformity with the requirements of the Price Administrator.

The District Court has failed to give consideration, or failed to recognize that, under these circumstances, the State Commissions did what they ought to have done, and that their actions were well grounded in fact, in law, and reason.

The State Commissions, and the representatives of the traveling public who were joined with them, had a *right to rely* upon the findings in the *1936 Fares Case*—that 1.5 cents was not unreasonable or otherwise unlawful for ordinary coach fare service in the southern region, and the finding in *Ex Parte 148* that such fare of 1.5 cents, increased by 10 per cent to 1.65, would be just and reasonable for the future.

The Phillips Case.

The mere fact that in the *1936 Fares Case* the joint Petitioners with North Carolina in this case may not have been parties to the proceeding before the federal Commission, does not deprive them of their *right to rely* upon the findings of the federal Commission in that "searching inquiry" into the reasonableness of the coach fares in the southern region. North Carolina and those joined with the State asserted their right to rely upon those findings of the federal Commission. In *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 35 S. Ct. 444, 445, the Supreme Court said:

> "But the proceeding before the Commission, to determine the reasonableness of the 2-cents advance (in lumber rates), was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate." "The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order".

And so, in these State Coach Fare Cases, the State Commissions and the representatives of the traveling public joined with them, had the *right to rely* upon and obtain the

benefit of those findings of the federal Commission in the *1936 Fares Case.* They were and are entitled to rely upon those findings, which were made after "searching inquiry" and upon adequate and exhaustive evidence with respect to the inherent reasonableness of ordinary coach fares in the southern region under the then existing conditions. No other searching inquiry into the reasonableness of such coach fares has been made by the federal Commission since the *1936 Fares Case.*

Thus the intrastate fares in the southern region of 1.5 cents, increased to 1.65 under the general advance of 10 per cent in the four States following Ex Parte 148, had the double sanctity under our dual system of government of the specific approval of the State and federal Commissions.

Under those circumstances added weight should have been given by the District Court to the point of law—asserted by the States—that the act of the North Carolina and other Commissions in withholding approval of any increase in the intrastate coach fares in view of President Roosevelt's order freezing rates and fares of carriers, and in the absence of any showing by the railroads what relation their expenses per coach passenger mile were bearing to the proposed fare, under changed conditions, after the great increase in non-reserved seat coach occupancy and the consequent reduction in unit cost per non-reserved seat coach passenger mile,—

> "on its face appears to be a legitimate exercise of power, and which has not been shown by clear and satisfactory evidence to operate unjustly and unreasonably, in a constitutional sense against the plaintiff in error (railroad)"

St. Louis & S. F. Ry. Co. v. *Gill,* 156 U. S. 649, 15 S. Ct., 484, 491.

The District Court apparently overlooked the point—stressed by North Carolina—that

"The authority to determine the reasonableness per se of intrastate rates lay with the *state* authorities and *not* with the Interstate Commerce Commission.

State of Florida v. *United States*, 282 U. S. 194, 214, 51 S. Ct. 119, 124.

The District Court and the federal Commission failed and refused to find that the statutory burden of proof to justify the increase from 1.65 cents to 2.2 cents was upon the carriers.

The federal Commission relied upon the Hasty Order of August 1, 1942 as the sole foundation of its finding that the interstate fare of 2.2 cents was reasonable. It had no other ground to rely upon. No evidence in the North Carolina Case was adduced by the railroads with respect to the inherent reasonableness of the interstate rates. The Examiner ruled that the burden was upon them to do so, and, failing that, it was "not subject to attack" and was "not in issue." Under the circumstances it was particularly arbitrary that the federal Commission, in the absence of evidence in the North Carolina Case, went out of the orbit of the case and relied upon the order of January 21, 1942, in a general revenue case which in no wise dealt with the inherent reasonableness of any particular rate on any particular railroad or railroads in any particular region.

The great reduction in expense per coach passenger mile caused by the great increase in car-occupancy.

The District Court failed to consider and did not even mention the point—which was so ardently pressed in North Carolina's brief, oral argument and Petition for further hearing and Petition to set aside the Order—that the railroads, having the burden of proof, failed to show how greatly the great increase in coach-occupancy had reduced the expense per coach passenger mile since the testimony was adduced in the "searching inquiry"—the *1936 Fares Case*.

The railroads proved almost everything else with respect to their reported statistics, except the expense per coach passenger mile. They had the facts. They produced statistics from which it is easy to compute, by simple arithmetic, what the expenses were per coach passenger mile. The fact that they failed to prove the most important single point of all, is evidence of the strongest character against them. *Interstate Circuit* v. *United States*, 306 U. S. 208, 225, 59 S. Ct. 467.

No "reasonable basis" was shown which would warrant a finding that the intrastate fares were unreasonably low.

The District Court said (56 F. Sup.; P. 616) that:

> "It is elementary that, a *reasonable basis* being shown, the fixing of a rate or fare is a matter for the Commission and not for the courts."

But no reasonable basis was shown. The District Court failed to consider that the fixing of the intrastate fare was the function of the North Carolina Commission—not the federal Commission. And the District Court failed to consider that the bare fact that the coach occupancy had so greatly increased since the *1936 Fares Case*, that the resultant expense per coach passenger mile had been greatly reduced, and that the action of the North Carolina Commission in withholding its approval of any increase—in the absence of definite proof of the expense per coach passenger mile—was a reasonable exercise of the state's power over intrastate commerce. The action of the federal Commission in ordering the 33.3 per cent increase in the intrastate coach fare, without any showing by the carriers of the unit expense per coach passenger mile, in relation to the unit revenue per mile (the fare) was not founded upon a *"reasonable basis"* for the exercise of the federal power over intrastate fares.

In the brief, oral argument, and petition for further hearing, North Carolina took the statistics presented in the railroads' exhibits and showed therefrom that the expense per coach passenger mile had been reduced to less than 1 cent. The process is quite simple.

Let us illustrate it simply. If the total expenses per coach mile are 30 cents and 10 revenue passengers ride, the expense is obtained by dividing 10 people into 30 cents, making 3 cents per mile. If 60 people ride in that coach instead of 10, we divide 60 people into 30 cents per coach mile and get ½ cent per coach passenger mile.

In the foregoing Statement of the Case, under the caption "Even a slight increase in car-occupancy causes a sharp reduction in unit expenses per passenger mile," and "A heavy increase in the average coach-occupancy causes only a negligible increase in the expense per coach mile" and "the high increase in passenger earnings was due primarily to the very large increase in car-occupancy in coaches" and "the heaviest increase in car-occupancy was in coaches" and "Exhibit 9 provides other data from which the approximate expense per passenger mile in coaches may be readily computed" we showed that the expense per coach passenger mile in 1943 was only *63 hundredths of one cent.* (Pr. 519).

In the face of this simple showing derived from the railroads own exhibits, who would say that the increase in the fare from 1.65 cents to 2.2 cents had any "reasonable basis" where the expense had gone down to less than 1 cent per mile? If a steel mill produces steel at a unit expense of $63 per ton would that be a "reasonable basis" for an increase in price from $165 to $220 per ton?

The indisputable evidence is that the minimum intrastate coach fare of 2.2 cents prescribed by the federal Commission is extortionate and unreasonably high in relation to the expense of 63 hundredths of 1 cent.

Both the Commission and the District Court have excluded from their Report and Opinion these highly relevant and controllingly vital facts and have failed and refused to receive any further evidence with respect to the expense per coach passenger mile. The order should be set aside for failure to receive and failure to consider such evidence owing to an erroneous view of the law. *Interstate Commerce Com.* v. *Southern Railway*, 105 Fed. Rep. 704; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648, 20 S. C. T. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 21 S. Ct. 516; *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 16; S. Ct. 666.

The order of the federal Commission is void for "unreasonableness, departure from statutory standards or lack of evidentiary support". *Interstate C. Com'n* v. *Hoboken Mfrs. R. Co.*, 320 U. S. 368, 64 S. Ct. 159.

The Courts' power to review the evidence before the federal Commission with respect to the reasonableness of the intrastate charges is much broader than the narrow concept expressed by the District Court.

The District Court's concept of the power of the Courts apparently is that the Courts have no authority whatsoever to look into the question of the inherent reasonableness of the charges prescribed by the federal Commission for intrastate applications in Section 13 proceedings.

The District Court said (56 F. Supp. 616) that the Courts,

> "on review of an order of the Commission, may not substitute their judgment for that of the Commission as to its reasonableness."

(Pr. 563). In other words, the District Court's view apparently is that when the federal Commission increases an intrastate rate, there is no going behind that finding to see whether it was right or wrong, and that such a finding is th eultimate step in rate-fixing which is outside of and beyond any control through judicial process.

The Supreme Court has followed an entirely different and broader concept of judicial review of such findings in Section 13 cases of the federal Commission. The Supreme Court has clearly defined a number of judicial limitations upon the power of the federal Commission to fix a minimum intrastate charge based upon a finding of reasonableness.

In *State of Florida* v. *United States*, 282 U. S. 194, 211, 214, 51 S. Ct. 119, 124, the Supreme Court said that the question in Section 13 cases is not the authority of the federal Commission but of "its appropriate exercise," and that:

> The propriety of the exertion of the authority (by the federal Commission) must be tested by its relation to the purpose of the grant and with suitable regard to the principle that, whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power *must clearly appear.*"

And in holding that this must "*clearly appear*", the Supreme Court went on to say at p. 212 (124), that

> "It must appear that there are findings, *supported by evidence*, of the *essential facts* as to the particular traffic and revenue . . ."

and at p. 214 (124):

> "But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

In the North Carolina Case the District Court should have looked sharply into the evidence to see whether the federal Commission appropriately exercised federal power over

the state fares, and whether the evidence made it *"clearly appear"* that the federal Commission was justified in fixing the reasonableness of the intrastate fare, and that the fixing of the reasonableness per se of the minimum intrastate fare was "supported by evidence", and that there were findings of the "essential facts as to the particular traffic and revenue", in addition to findings that the "intrastate rates on the particular traffic (ordinary coach traffic) were not remunerative or reasonably compensatory".

If the District Court had not held the erroneous view that the power of the Courts in reviewing the findings of unreasonableness of intrastate rates is strictly limited, and if the District Court had held the concept stated in the Florida Case, the District Court would have looked carefully into the evidence as to the inherent reasonableness per se of the intrastate fare, and would have noted that the railroads had failed to make any showing that the intrastate fare was "not remunerative or reasonably compensatory"; that the federal Commission had made no finding that the intrastate coach fare was "not remunerative or reasonably compensatory", and that, on the contrary, the evidence shows by indisputable facts that the then existing intrastate fare and the proposed fare were both extortionately high and unreasonably high and were assisting other traffic to yield excessive and extortionate rates of return upon investment.

Definite restrictions and limitations have been placed by the judiciary upon the power of the federal Commission to fix minimum intrastate rates.

Other decisions, founded upon this broader concept of the commission's power to prescribe minimum reasonable rates for intrastate traffic have placed definite restrictions and limitations upon that power, which the District Court has not recognized.

In *Illinois Commerce Commission* v. *Thomson*, 318 U. S. 675, 684, 63 S. Ct. 834, 838, the Supreme Court (no dissents) said:

"The Interstate Commerce Commission is without jurisdiction over intrastate rates except to protect and make effective some regulation of interstate commerce . . ."

In *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U. S. 541, 32 S. Ct. 108, the federal Commission had prescribed a maximum reasonable interstate rate on forest products—(not even a Section 13 Case and no intrastate rates were involved). The Supreme Court held that the Courts have power to set aside an order of the federal Commission if it (1)

"goes beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates *contrary to evidence*, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an *unreasonable manner* as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

"Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but that the courts will not examine the facts further than to determine whether there was *substantial evidence* to sustain the order."

The District Court failed and refused to apply the "substantial evidence" rule and failed and refused to hold that the order raising the intrastate coach fares was "*contrary to evidence*".

In no previous case have we found a situation comparable to the fact here, where the Commission raised the intra-

state rate from 1.65 cents to 2.2 cents when the full expense was 63 hundredths of one cent.

Since the protecting arm of the Courts will set aside an order of the Commission when the rate fixed is *"so low as to be confiscatory"* (and that can only be determined by the court by an examination of all of the evidence) North Carolina asks that the Supreme Court expand the doctrine of limitations upon the powers of the federal Commission to prescribe intrastate rates by holding that the Courts will set aside an order of the Commission when the intrastate rate fixed is *so patently high as to be extortionate.* The traveling public is as much entitled to protection from fares which are *so patently high as to be extortionate* as the railroads are entitled to protection from fares which are *so low as to be confiscatory.*

In *United States* v. *State of Louisiana*, 290 U. S. 70, 78, 54 S. Ct. 28, 32 the Supreme Court held that, in a proceeding under Section 13 (3) and (4),

> "it is not questioned that the section confers no authority on the Commission to require intrastate rates to be raised *above a reasonable level.*"

In that case the Supreme Court at page 79 pointed to the distinction between a "general revenue" case and a "particular rate case", involving one commodity in a limited area. The District Court's confusion upon this point is the starting point for its erroneous reasoning and concept with respect to the fixing of a minimum reasonable rate for intrastate traffic.

Mere comparisons of the two rates is not sufficient.

The federal Commission, realizing the lack of basic facts which would be necessary to support the requisite finding that the intrastate fare was confiscatory, or non-compensatory or unreasonably low, found that the comparison of the intrastate fare of 1.65 cents with the interstate fare of 2.2 cents was sufficient, saying (258 I. C. C. at page 143) that:

"It is a well settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services."

There is no such rule applicable to the situation presented here.

When two rates are so much per mile, merely to multiply each rate by a given mileage, is just a way of restating the same thing. Is this a comparison of rates which is sufficient to determine the reasonableness of the higher of the two? Is the one unreasonably low just because it is lower than the other?

If this form of reasoning has any appeal to the reasonably minded, then, there can be no longer any occasion for any difference between any interstate and intrastate fares. The intrastate, if lower would have to give way to the interstate rate, as a matter of course and the State would be ousted automatically from exercising any control over the intrastate rates. It is hoped that no approval of that shallow line of reasoning by the Commisison will be accepted and condoned by this Court in this proceeding where "substantial evidence" of the unreasonable lowness of the intrastate fare of 1.65 cents is lacking.

This Court, in *Florida* v. *United States*, 282 U. S. 194, 214, 212, 51 S. Ct. 119 has expressed the rule to be that showing a "mere difference between particular rates on interstate and intrastate traffic is not sufficient." The same doctrine has been stated and followed in other decisions of the Supreme Court.

Troop train-movements.

The Commission considered evidence with respect to the heavy extra expenses incurred in the operation of troop trains. But the charge for troop movements which is lower than 2.2 cents is a matter of contract between the carriers and the federal government, and is not at issue in this proceeding. The evidence relating thereto was improperly

received. Consideration of such evidence as a justification for an increase in ordinary coach fares is arbitrary and unreasonable. The Commisison omitted to say that the lower charges for troop movements were "very remunerative" (Tr. 16-(8)). If troop movements are expensive why not increase the price? Why shove that cost onto coach fares? Why not shift that expense to pullman fares? Why not shift it to commutation fares which are much lower than coach fares? Why not shift it to mail-pay, or milk, or express? The District Court erred as a matter of law in upholding the commission in receiving and considering evidence with respect to the extra heavy expense of troop movements as a justification for an increase in ordinary coach fares.

Thus the federal Court sought to sustain the fixing of a minimum reasonable coach fare for intrastate traffic on three points: first the fact that the interstate fare of 2.2 cents had been approved for the South without hearing, report, or evidence, in the Hasty Order of August 1, 1942, so as to conform to the interstate fares which were in effect in the East and the West; second, a mere showing of the difference between the inter and the intra fare; and third, the extra expenses incurred in the movement of troop trains, which are charged less than the intrastate fare, and which are not at issue.

The three points are untenable. The District Court erred in failing and refusing to find that there was no substantial evidence to support the fixing of a minimum intrastate coach fare at 2.2 cents; that the finding is contrary to the evidence; and that the railroads failed to sustain the statutory burden of proof.

Rate-making principles.

The District Court labored under the erroneous concept that all intrastate rates must be the same as all interstate rates for like services for, otherwise, the State Commissions

would be applying their own ideas of rate-making in fixing their respective intrastate rates.

The District Court said; (at page 619)

> "It would greatly burden if not entirely wreck the transportation system of the country for local commissions to have the power to base intrastate rates or fares on *their ideas* as to how the expense of maintaining an adequate transportation system should be apportioned among the various classes of business carried on by the carriers . . .
>
> "The Commission has fixed the rates and fares on various classes of business with a view of maintaining their efficiency as interstate carriers for the service of the public; and the rate structure so carefully constructed should not be burdened by lower intrastate rates because local regulatory bodies may entertain different theories of rate making."

There is nothing in the evidence or the briefs which would call forth these expressions of the District Court. The District Court's statement is founded upon a misconception of the law and the facts.

None of the four State Commissions is here asserting any new, or novel, ideas or principles of rate-making of of their own. Every rate-making principle which they have relied upon in these proceedings with respect to the reasonableness of the rates conforms with those principles which have been asserted and often adhered to by the federal Commission itself.

The State Commissions are relying upon those rate-making principles which have been accepted by the Courts.

For example, the federal Commission in the *1936 Fares Case* carefully analyzed the unit expenses of the different types of passenger service, in relation to the expenses. The federal Commission recognized the necessity for a lower basis of ordinary coach fares in the south than in the East or West. The federal Commission reduced the coach fare in the East and West to 2 cents and said that the fare of 1.5

cents in the south was not unreasonable or otherwise unlawful. If it was lawful to have different fares in the south up to August 1, 1942, why did it become unlawful on August 1, 1942? There are no findings in Ex Parte 148 or the Hasty Order of August 1, 1942 which answer this question.

In *Intrastate Class Rates in New Jersey*, 203 I. C. C. 357, the federal Commission said, at page 362 that:

> "The law does not require uniformity between interstate and intrastate rates except where it is *clearly necessary* to the proper regulation of interstate commerce."

In *State of Florida* v. *United States*, 282 U. S. 194, 212, 51 S. Ct. 119, 124, the Supreme Court said:

> "The (federal) Commission has no general authority to regulate intrastate rates, and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates."

The concept of the District Court, if affirmed and generally adopted would mean the elimination of the power of the states to regulate intrastate charges of carriers.

The District Court's line of reasoning would shut off any zone of reasonableness where the differing intrastate and interstate rates are both upon a reasonable basis, and within the zone of reasonableness.

The federal Commission and the Courts have asserted the principle of rate-making that there is a zone of reasonableness above which and below which the carriers may not go in publishing rates.

In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506, 55 St. 462, 465, The Supreme Court said:

> "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself."

The Courts have followed that principle also. And yet, in this case, the Commission recognized that the 1.5 cent coach fare in the south and the 2 cent fare in the East and West were within the "zone of reasonableness", but in the North Carolina case the federal Commission holds, without any evidence or finding on this point, that there is no zone of reasonableness, and that the *maximum* fare which it has prescribed for the East and West is the reasonable *minimum* fare for the south.

Another example. In the *1936 Fares Case* and the *Eastern Fares* Cases which followed it, the federal Commission studied with care the relation of standard coach fares to the fares for other types of passenger service and passed upon the relationship of the coach fares to pullman car fares, and the relation of coach fares to deluxe streamlined reserved-seat coach trains, before fixing the fares for any of these types of passenger service, and found that the prior higher fares had driven away the business and that the lower fares would attract increased total revenues, and that the trouble was not with the coach fares but with the higher-valued pullman fares. In the Statement of the Case above, under the caption "The 1936 Fares Case", and subheadings thereunder, we have set forth other important factors and principles which were employed by the federal Commission in arriving at its ultimate findings in the *1936 Fares Case*. North Carolina is relying upon those principles here.

Another example. The federal Commission in Ex Parte 148 recognized the necessity for the separate treatment of "commutation fares", under the new era of economic conditions and has dealt separately with commutation fares in a number of particular cases. Why did the federal Commission fail and refuse the Petitions to investigate in like manner the ordinary coach fares under like changed conditions?

Another example. In the *1936 Fares Case* the federal Commission gave separate study to the matter of the value of the passenger services to the traveler, and found that the service in the deluxe streamlined reserved-seat trains and the extra fare trains was so superior to ordinary coach service as to warrant *higher* fares because the value of the service is more than the value of service in ordinary trains with non-reserved seat overcrowded coaches. That point was asserted by North Carolina, and evidence was submitted to prove the point. Why did the federal Commission apply that well known rate making principle in the *1936 Fares Case* and ignore it in the North Carolina and other State Fares Cases?

Thus the rate-making principles which the State Commissions employed in the coach fare cases before them were the same well-established principles which the federal Commission itself had employed and given expression to in the *1936 Fares Case* and other cases, and later confirmed by the Courts. The States presented no new or different rate-making schemes of their own. They were relying upon the principles which have become established by the reports of the federal Commission and the Courts.

The District Court erred in holding the concept that an increase in intrastate fares to the interstate basis is essential as a prophylactic to prevent the State Commissions from adopting some conflicting and different rate making schemes of their own.

Nothing in the record in these cases justified the District Court's discourse upon this subject.

Thus the federal Commission's act in prescribing a minimum reasonable fare of 2.2 cents for travel in non-reserved seat coaches in ordinary trains in intrastate commerce in North Carolina and the three other southern states, was unreasonable, contrary to indisputable facts, contrary to the evidence, without substantial evidence to support it, and an unwarranted invasion of the authority of the States.

The District Court, in upholding the Order of the Commission, fixing minimum reasonable coach fares in North Carolina was guided by misconceptions as to the facts and as to the principles of law which govern the judicial review of Section 13 orders of the federal Commission.

POINT III (b). The evidence negatives the need of increased revenues from coach traffic or revenues from all traffic.

Further on that point, attention is called to the fact that the Price Administrator tendered evidence, which was not considered or reported by the Commission or the District Court, showing conclusively that if the interstate coach fares on respondents' lines, were reduced to the intrastate level of 1.65 cents, the carriers' passenger operating ratio would, even then, be the splendidly low figure of 65.2 per cent (Pr. 448, 444). The Commission and the District Court erred in failing and refusing to receive and consider that evidence. The excellent condition revealed by the foregoing would contribute to the return on investment in excess of a fair rate.

Revenue-burden—discrimination.

The federal Commission's finding, that the "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service", (258 I. C. C. 133, at page 155) (Pr. 95-96) is without any substantial evidence to support it, is contrary to indisputable facts, and the report contains none of the basic findings which are requisite to support that ultimate finding.

Commissioner Splawn, in his scholarly dissent said that:

> "There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service,

> or that there is any deficiency in respondents' revenues from their passenger and freight traffic as a whole. As a matter of fact it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by section 15a."

(258 I. C. C. 133, at page 160) (Pr. 102-103).

Further on that point, attention is called to the fact that the Price Administrator tendered evidence, which was not considered or reported by the Commission or the District Court, showing conclusively that if the interstate coach fares on respondents' lines were reduced to the intrastate level of 1.65 cents, the carriers' passenger operating ratio would, even then, be the splendidly low figure of 65.2 per cent (Pr. 448, 444). The Commission and the District Court erred in failing and refusing to receive and consider that evidence. The excellent condition revealed by the foregoing would contribute to the return on investment in excess of a fair rate.

The fact that the respondents are earning an average rate of return of 18 per cent before federal income and excess profits taxes is conclusive proof that the Commission's finding of revenue need is directly contrary to indisputable facts.

The fact that the four North Carolina railroads, whose fares are at issue in the North Carolina case, are experiencing such an average highly favorable passenger operating ratio which is lower than their freight operating ratio, is conclusive proof that the passenger traffic is paying a little more than its fair share of the total transportation expenses. The Commission's finding on page 155, that

> "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues,"

(Pr. 95) is contrary to these indisputable facts, and is without evidence to support it.

In the *1936 Fares Case* and the *Eastern Fares Cases* the findings were that the trouble was not with the coach fares but with the pullman and parlor car fares. Since that time the average coach-occupancy in the non-reserved seat trains has expanded to many times the average in the early nineteen thirties; the troop train fares are lower than the intrastate ordinary coach fares, commutation fares are lower than the standard coach fares, and hence ordinary coach fares are paying relatively more than any other type of passenger traffic towards creating the extremely profitably low passenger operating ratios of these North Carolina railroads. These indisputable facts preclude any finding of the federal Commission to the contrary that the carriers were entitled to any increase in the intrastate ordinary coach fares of these four North Carolina lines, or that such coach fares cast any revenue burden upon interstate commerce, or that they were so low as to result in unjust discrimination against interstate commerce from a revenue standpoint.

The indisputable facts conclusively negative the need of any increased revenue from coach fares, or increased revenues from all traffic of these four respondent North Carolina railroads.

POINT IV. Rates of return should be computed before, not after, federal income and excess profits taxes.

The federal Commission on page 138 of its Report said that the Price Administrator, in the North Carolina Coach Fares Case (Pr. 76)

> "also submitted evidence intended to show that, on their combined freight and passenger operations for the 12 months ended October 31, 1943, these seven respondents are earning before federal income taxes more than a fair return on various book investment

> bases computed by the witness, and are not in need of the additional revenue which the proposed increased intrastate fares are expected to produce."

The federal Commission erred in failing and refusing to disclose that the average rate of return of those carriers was about 18 per cent before federal income and excess profits taxes—a vital and highly important fact.

On page 149 of the report (Pr. 89) the federal Commission found that

> "The relation of net railway operating income to investment in railway property including cash, material, and supplies, for these respondents (in Kentucky) reflects average rates of return *after* Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; and 1942, 5.78 percent."

The federal Commission erred in failing and refusing to show the return, so computed, for 1943, which was of record.

The federal Commission, upon the basis of these figures, then found that (Pr. 89)

> "The evidence here before us does not indicate that the passenger traffic of these respondents as a group *is* producing more than a fair return."

Attention is directed to the fact that no such finding is made in the North Carolina case with respect to the four North Carolina railroads and to the fact that the finding, in 1944, was based upon rates of return after federal income taxes for 1942, omitting the year 1943. Therefore, although the Commission has the 1943 estimated rates of return both before and after federal income taxes in the evidence before it when its decision was reached—March 25, 1944, it made a finding in the *present tense* and failed to show the rates of return upon which the "present" finding was made. There are no basic findings or evidence to support that finding. It is contrary to the indisputable facts which were presented

to the federal Commission and contrary to the more highly refined and accurate figures which were presented in the petitions for further hearing and in the petition and affidavits presented to the District Court. If the basic figures which were requisite to that "present" finding had been set forth in the Commission's report, the facts would have shown indisputably that the finding was wrong. The only way that the Commission could avoid its predicament and uphold that finding was to leave out of its report the basic findings as to what were the rates of return in 1943 on all traffic and on passenger traffic.

We have shown elsewhere that the passenger traffic of the North Carolina railroads was earning a higher rate of profit than the freight traffic or, freight and passenger combined (Pr. 405).

It is clear that whatever findings were made as to rates of return on all traffic or passenger traffic in the North Carolina Case or the Kentucky Case, the federal Commission based its findings on net railway operating income *after* charging against income the federal income and excess profits taxes. This point of law was stressed before the District Court, which failed to rule upon it.

In *Reduced Rates, 1922*, 68 I. C. C. 676, at pages 682, 683, 684, the federal Commission discoursed at length upon this very question—whether rates of return on investment should be computed on net railway operating income before, or after deducting federal income taxes from income. The Commission at page 734 fixed 5.75 per cent as a fair rate of return upon the aggregate value of the railway property of the carriers. And the Commission said, at page 683,

> "Under paragraph (3), above quoted, rates are to be so adjusted that carriers as a whole or in designated rate groups will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return. If this were realized in any instance the carrier would receive that return over and above all taxes, including the federal tax on income, and if the fair

return as determined and made public by us was 6 percent the carrier would hold that return "tax free" in the sense that after payment of its income tax it would still have left the 6 per cent. Railway corporations, like all others, are subject to income taxes which, since January 1, 1922, amount to 12.5 per cent on their net income less deductions computed as provided in the income tax law. 42 Stat. L. 277. In our view railway corporations should, like other corporations, *pay their Federal income taxes out of the income*, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it to retain the designated fair return over and above the tax."

In *Increased Railway Rates, Fares and Charges*, 1942, 248 I. C. C. 545, twenty years later, the federal Commission was still holding firm to that carefully considered point in *Reduced Rates, 1922*, quoted above, and repeated at page 556 the following finding from the *1922 Case:*

"railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it (them) to retain the designated fair return over and above the tax."

Although this point was pressed before the federal Commission and the District Court, the federal Commission ignored it and the District Court failed and refused to consider it. The District Court upheld the findings of the Commission, based upon rates of return *after* federal income and excess profits taxes.

The Commission's action was arbitrary and the Court's confirmation of the ultimate findings of the Commission is the equivalent of saying that the Commission was right in law in computing rates of return *after* federal income and excess profits taxes. The District Court erred in law, in failing and refusing to hold that rates of return should be computed *before* federal income and excess profits taxes, and as computed in the exhibits and testimony presented by

the expert economist of the Office of Price Administration —Mrs. Doris Whitnack (Pr. 56A).

The Courts will not sustain an order of the Commission based upon findings which display a misconception of law as to conceded or undisputed facts. *Stickney* v. *Interstate Commerce Commission,* 164 Fed. Rep. 638.

In view of the extremely high profits of the railroads under war-conditions it is of grave importance that this question of law be settled. Let us repeat the expression of Commissioner Joseph B. Eastman (deceased) upon this point in *Increased Railway Rates, Fares and Charges,* 1942, 255 I. C. C. 357, at page 403:

> "The matter has another aspect, not so fundamental but yet of importance. A considerable number of the railroads are now paying in large amounts, not only income taxes, but also excess-profits taxes. Public utility corporations are surely inappropriate mediums for collecting taxes of this character from the public which they serve. The fact that such taxes are collectible is always an incentive, also, to improvident or unnecessary spending."

We ask that the Supreme Court hold that the order of the federal Commission, which is based upon findings with respect to rates of return "after" federal income and excess profits taxes, and which fails to report or consider the rates of return of record which are computed "before" such taxes, is founded upon an erroneous concept of law.

POINT V. Coach fares cannot lawfully be increased to compensate for passenger deficits in former years.

The plain import to be gained by a reading of the entire Report of the federal Commission is that the Commission pushed entirely out of mind the conditions during the war-years, commencing with December 1941, up to the time of the entry of its Order in the North Carolina Case in May, 1944, in arriving at its ultimate findings, and based its

conclusions upon the statistics of operations for the bygone year of economic depression in the nineteen thirties.

The federal Commission's ultimate conclusions are based upon the concept that the railroads are entitled as a matter of right and law to continue to charge rates and fares which will yield them excessive profits during the existing economic era of war-born prosperity for the railroads as a means of offsetting and recovering their losses from passenger operations in the bygone era of economic depression.

The Commission was well aware of the greatly changed conditions, mentioning them in *Ex Parte 148*, and in relating the evidence in the North Carolina Case but refused to base its findings in the North Carolina Case upon the existing and greatly changed conditions, although the evidence was before it with respect to the current years of prosperity for the railroads, commencing in 1941 and extending through the date of its Order of May 8, 1944.

Pages 137 and 138 (Pr. 76-78) of the federal Commission's report contain full recitals of the passenger deficits of the railroad-respondents in the four State Coach Fare Cases. And the federal Commission shows the deficit years of 1936 to 1941, inclusive, but shows only one of the war years—1942, in arriving at so called average deficits for a 7 year period, although the system figures for the seven respondent Kentucky railroads were available for the year 1943. (On page 149 the Commission sets forth system figures for the year 1943 compared with 1942 (Pr. 89)).

Although this Point was pressed before the District Court that Court made no direct finding about it. The District Court's reasoning indirectly disposes of the question upon a tangent line of thought. The District Court labored under the misapprehension that the evidence in the North Carolina Case related solely to a single war year, and the District Court said:

(56 F. Supp. at page 616 (Pr. 563-564))

"It is well settled that ordinarily the experience of a single year is an unsafe guide in fixing rates".

The District Court appears to uphold the Commission on the ground that the statistics for the year 1942—one war-year—represented abnormal conditions which the federal Commission was justified in pushing aside. Both the Commission and the District Court failed and refused to consider, as requested, the fact that at the time of the entry of the Commission's order in May 1944, and at the time of the hearing before the District Court in July 1944, the war conditions had been continuing since December 1941, about two and a half years, and that there was reasonabe expectancy that the war conditions would continue for a number of years in the future.

Both the Commission and the Federal Court indulged in a presumption that 1942 was the one and only "abnormal" year, whereas the evidence reported by the Commission (258 I. C. C. at page 149 (Pr. 89)) for the year 1943 shows plainly that the passenger revenues, as well as the total revenues of seven southern railroads, increased enormously in 1943 over 1942, and that the total operating ratio in 1943, 58.2, was slightly more favorable to the railroads than the ratio of 58.7 for 1942 (Pr. 89).

The District Court erred in fact in viewing the evidence as relating to only one year of changed economic conditions, and defining 1942 as an abnormal year, in view of the indisputable fact that the revenues and net revenues in 1943 were greater than in 1942, and the matter of common knowledge, of which the District Court should have taken judicial knowledge, that this nation is still at war, with indications that the existing economic conditions will continue for several more years at least.

The method of reasoning of the District Court indirectly upholds the Commission's action in increasing intrastate fares of the southern carriers as a means of offsetting passenger deficits in the bygone economic era. The District Court erred in failing and refusing to find, as requested, that the Commission erred as a matter of law in increasing

the intrastate coach fares so that the railroads might continue to earn excessive profits under existing changed conditions as a means of recouping their passenger deficits in the bygone era of economic depression. The Supreme Court in the *Natural Gas Case, Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 62 S. Ct. 736, held that "regulation does not insure that the business shall produce net revenues". At page 590 (745) the Supreme Court said:

> "But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. Galveston Electric Co. v. City of Galveston, 258 U. S. 388, 42 S. Ct., 351, 66 L. Ed. 678; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 447, 23 S. Ct. 571, 573, 574, 47 L. Ed. 892. The deficiency may not be thus added to the rate base for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business."

We ask that the Supreme Court hold that the Commission and the Court erred in the concept that the railroads should be allowed to earn excessively high profits and rates of return (18 per cent) under existing conditions, and during these war years as a means of recouping their deficits from passenger operations in the bygone era of economic depression.

POINT VI. Streamlined trains and troop movements.

The federal Commission erred in considering the extra expenses and costs that pertain exclusively to the operation of streamlined trains and the movement of troops as evidence justifying an increase in fares for travel in antiquated non-reserved seat coaches in slow trains.

The federal Commission in its Report has laid much stress upon the testimony of the railroads that the railroads

> "have expended large sums of money in remodeling and air conditioning their passenger equipment".

(258 I. C. C. at page 141), (Pr. 79) and in providing Diesel-powered locomotives for streamlined trains; and that the handling of troop trains entails especially heavy extra expenses. (258 I. C. C. at page 141) (Pr. 79). The federal Commission recites other items of added expense which are incident to passenger traffic as a whole.

None of these extra expenses for deluxe stream-lined trains or for troop movements, are attributable in any degree to ordinary overcrowded non-reserved seat coach travel. Nor are the other items of added expense, which the federal Commission recites, directly attributable to coach travel alone.

The evidence is indisputable that North Carolina intrastate travelers are practically prohibited and excluded from using the expensive fast deluxe streamlined trains with comfortable reclining reserved seats, and therefore no part of the return on that added investment in streamlined trains can lawfully be charged to travel in antiquated, overcrowded, non-reserved-seat, dirty, ill-lighted and ill-ventilated antiquated coaches which are typical of local travel in the four states.

In the *1936 Fares Case* the federal Commission had specifically held that fares in these deluxe fast streamlined trains might be *higher* than ordinary coach fares, but the railroads in the south did not avail themselves of that opportunity. The federal Commission in the *1936 Fares Case* recognized the difference between the value and cost of the service in reserved-seat streamlined trains and non-reserved seat trains. In the North Carolina Case the federal Commission failed and refused to take into consideration

the differentiation, which it had made in the 1936 Fares Case, between the cost of travel in ordinary non-reserved seat coaches and in luxurious reserved seat coaches in streamlined trains.

The increased aggregate expenses of all passenger train services were considered in Ex Parte 148; and a 10 per cent increase was permitted in civilian passenger fares in coaches and pullmans. Therefore, whatever added general expenses were attributable to all passenger traffic have been accounted for in the 10 per cent increase.

But, no 10 per cent increase was placed upon commutation fares, which are much lower than standard fares. They were treated separately, in some instances the proposed increases in commutation fares were denied, Chicago-Commutation Fares, I. C. C. No. 28974; and in others allowed in whole or in part, *Passenger Fares of Hudson M. R. Co.*, 256 I. C. C. 507. In other instances the railroads withdrew their applications before the Commission rendered its findings. Commutation Fares—New York, I. C. C. No. 28973 and—Philadelphia—Camden, I. C. C. No. 28975.

In Commutation Fares—Chicago, Ill., District, 258 I. C. C. 725 (I. C. C. Docket No. 28974) the federal Commission conducted a separate inquiry jointly with the Illinois State Commission, into the reasonableness of a proposed increase of 20 per cent in commutation fares between the Chicago district and points in southeastern Wisconsin, or northwestern Indiana or southwestern Michigan.

That is the type of procedure which is contemplated by Section 13 (3) of the Act, and which should have been adopted for these four southern states coach fares cases.

The Commission commented upon the lack of uniformity of commutation fares in the Chicago District, but did not compel uniformity in them.

The Federal Commission held the carriers to the statutory burden of proof and found that the cost data submitted by the railroads cannot be accepted as accurately reflecting

the cost of the commutation service of any respondent. A similar finding should have been made in the North Carolina Case.

The federal Commission found in the Chicago District Case that:

> "respondents' revenues derived from commutation traffic have been steadily increasing; that the passenger operations as a whole of each respondent are making a substantial contribution to its present net earnings which are considerably in excess of the earnings of the pre-war years; and that a general commutation-fare increase is not necessary (1) to maintain an adequate national transportation system, (2) to maintain essential commutation service by respondents, nor (3) to carry out the national transportation policy declared in the act."

> "We, therefore, conclude that respondents have not justified any general increases in their commutation fares in the Chicago district, and that the commutation fares under consideration have not been shown to be unreasonable or otherwise unlawful."

The Commission said that the commutation fares, which it found not unreasonable, ranged from 0.6 to 1.6 cents a mile.

Travelers on commutation tickets can ride in the same coaches in the same trains, alongside of travelers who pay the standard coach fares. And yet the same Commission which authorized an increase of 33.3 per cent in the ordinary coach fares in the southern states, in addition to the 10 per cent general increase, without hearing, report or order, found that increases in commutation fares in the wide Chicago District, ranging from 0.6 to 1.6 cents per mile, were not unreasonable and that no percentage increase in those fares was justified.

That investigation was instituted April 28, 1943, prior to the order instituting the investigation into the ordinary

coach fares in the four Southern states—October 13, 1943; but in the same year. (Pr. 141).

Thus the Commission's entire action and orderly course of procedure and line of reasoning in the Chicago-District Commutation fares was exactly opposite to its action, procedure and reasoning in the four State Coach Fares Cases.

No increase was authorized in "furlough" fares. On the contrary, on October 1, 1942, at the time when the interstate fare of 1.65 cents in the south was increased to 2.2 cents under the Hasty Order of August 1, 1942, the round-trip fares for personnel of the armed forces etc., were *reduced* to 1.25 cents per mile.

The evidence shows that the charges paid by the government for troop train movements—which, according to the railroads' testimony entailed such extraordinarily heavy expenses, were "very remunerative" (tr. 16-18). But the charges for these movements are for interstate travel, and are not regulated by the North Carolina Commission.

Before the Commission we did not ask, and are not asking here, that separate fares be prescribed for any of these types of coach service-deluxe reserved-seat coach service, troop train service, furlough service or commutation service. The point we made was that, in spite of the added cost and value of streamlined coach service, the extra heavy expenses of troop train movements, the reduced furlough fares and the non-addition of the 10 per cent increase to these latter types of coach service, (under the combined types of passenger fares) the passenger operating ratios since Pearl Harbor have been extremely low and over-profitable to these southern railroads, the average coach car occupancy has risen to unprecedented heights, with resultant reduction in the expense per coach-passenger mile far below the then existing intrastate fare of 1.65 cents—even less than 1 cent,—and the passenger traffic is contributing relatively more than the freight traffic in producing the extortionate rates of return—18 per cent before

federal income and excess profits taxes; and that, under these circumstances, the federal Commission's consideration of the extra costs of streamlined trains, and troop movements as justification for an increase in intrastate coach fares, was arbitrary and unreasonable.

Coach fares for civilian travel in non-reserved seat, antiquated coaches in slow trains cannot lawfully be increased to meet the added and extra expenses of streamlined trains and troop movements.

The Supreme Court held in *Northern P. R. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585, 35 S. Ct., 429, 433, that the outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned.

The federal Commission's assignment to ordinary coach travel of the extra expenses of streamlined trains—which North Carolina travelers are practically prohibited from using,—and the extra heavy expenses attributable directly to troop train movements, was a mistake in law. The evidence relating to the extra investment and expenses of streamlined trains and troop train movements should have been excluded. The ultimate findings, based on these errors of law cannot be sustained.

POINT VII. There is no proof of preference and prejudice between persons.

The federal Commission found (258 I. C. C. at page 154) (Pr. 95) that the lower intrastate coach fares resulted in

> "the undue and unreasonable advantage and preference of intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers."

The District Court upheld that finding. There is no evidence to support it.

No travelers in other states intervened on behalf of the railroads or testified in the North Carolina Case. No inter-

state traveler has complained to the federal Commission of any undue prejudice as between interstate and intrastate travelers.

Only an interstate traveler, or travelers, would have been competent to complain of undue prejudice between persons or to testify that rates or fares operated to his or their disadvantage or injury.

There is a total absence of any such allegation or proof of undue prejudice against interstate persons.

Undue prejudice between persons is prohibited by Section 3 (1) and Section 13 (4). The phrases of both sections are almost identical. The phrase in Section 3 (1) is:

> "any undue or unreasonable preference or advantage to any particular person" . . .

and the phrase in Section 13 (4) is:

> "any undue or unreasonable advantage, preference, or prejudice as between persons" . . .

In many cases before the federal and state commissions, and before the courts, the question has been raised as to what kind and extent of evidence is essential to support a finding of "undue prejudice" within the meaning of the quoted phrases from Sections 3 (1) and 13 (4).

In many cases the railroads, when defendants, have strenuously insisted that an allegation of undue prejudice between persons must be buttressed by convincing proof, and that strict proof should be required as an indispensable requisite to a finding of undue prejudice between persons.

The federal Commission sustained the railroads' argument on this question in *Barrett Co.* v. *Atchison, T. & S. F. Ry. Co.*, 172 I. C. C. 319, 333, 334, and said that

> "While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made. They may

not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference. *Florida* v. *United States*, 282 U. S. 194. The evidence must ordinarily establish that the alleged prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another, . . ."

"No allegation is made, and no evidence has been introduced tending to show, that the intrastate rates on the commodities alleged to be preferred are so low as unduly to burden or discriminate against interstate commerce. On the contrary, complainant states on brief that they are reasonable. The allegations of violations of section 13 must, therefore, be presumed to rest on the provisions of paragraph 4, which prohibit undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other. No specific persons or places are alleged to be preferred. We are asked to make a broad finding that the intrastate rates applicable on road oil between all points in *four States* and on asphalt between all points in three of the same and two additional States are in violation of Section 13. Evidence to sustain an order finding that intrastate rates are violative of Section 13 in that they unduly prejudice persons or places must *be of equal dignity and probative value as the evidence required to sustain a finding under section 3.*

The Commission found in the *Barrett Case* that the intrastate rates in five states were not shown to be in violation of Section 13.

The issue of prejudice under Section 13, in the Barrett Case—a leading case on this particular subject, and one often quoted and relied upon by the railroads,—is similar in many respect, to the question presented in this North Carolina case.

Commissioner Splawn's scholarly dissent explains with clarity and precision the applicability of the sound legal

principle of the *Barrett Case* to the facts and circumstances in these intrastate coach fares cases.

All that Dr. Splawn has said on this subject, in 258 I. C. C. at pages 156, 157, and 158 is apt here. Only its length constrains us from reprinting it here in its entirety.

Dr. Splawn points out that: (P. 157)

> "no persons who pay the higher interstate fares and no localities are appearing herein to complain of undue prejudice and preference, or, without complaining, have testified that they are in any wise injured, and so far as these records disclose, none has complained to respondents. Under these circumstances we would not even have before us a complaint under Section 3(1), much less the evidence on which to base a finding of a violation of that section. Respondents do not ask for relief for any particular persons or places, but seek State wide orders."

Dr. Splawn then went on to discuss the *Wisconsin Fares* and *New York Fares Cases*, in relation to this same question of prejudice between persons. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 42 S. Ct. 232, and *State of New York* v. *United States*, 257 U. S. 591, 42 S. Ct. 239. In the Wisconsin Fares Case the Supreme Court said that

> "we cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone." (at page 580)
>
> "Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the interstate Commerce Commission has found to be fair to interstate commerce."

(at page 590, 591). Both the *Wisconsin Case* and the *New York Case* were *general revenue* cases and dealt with no

particular rates or fares for any particular types or classes of service; and they grew out of Ex Parte 74, *Increased Rates*, in which horizontal increases were permitted by the Federal Commission.

Dr. Splawn further said (258 I. C. C. at page 158) that:

> "In these (four southern states coach fares) cases there is no evidence whatever of competition or injury. The Court found (in the *Wisconsin Case*) that there was evidence which would support a finding of undue prejudice and preference against a large class of fares...
>
> "If the order of the Commission there (in the *Wisconsin Case*) could not be sustained as an order to remove undue prejudice and preference between persons and localities, what can be said in support of the State-wide orders here in (four southern states coach fares cases) which are unsupported by evidence beyond the mere difference in fares?"

North Carolina asks that the Supreme Court hold that the federal Commission's finding of undue prejudice as between persons was without any evidence to support it; and that the District Court erred in affirming that finding of the federal Commission.

POINT VIII. Uniformity.

The federal Commission has no power to order an increase in intrastate coach fares simply to bring about "uniformity".

The District Court's line of reasoning condones the act of the federal Commission in fixing a minimum reasonable intrastate coach fare at 2.2 cents for the purpose of effecting "uniformity" of the intra with the interstate coach fares, upon the hypothesis that mere proof or statement that there is a difference in fares is sufficient, in law, to condemn the intra, and sufficient in law to warrant the Order requiring the increase to the interstate level. That

concept of the District Court is revealed by the importance attached in its Opinion in two things: the Louisiana Case, and uniformity in other than these four states.

The Court said (on page 619) (Pr. 569) that:

> "the rate structure so carefully constructed should not be burdened by lower intrastate rates because local, regulatory bodies may entertain different theories of rate-making. These observations apply with *peculiar force* in the case at bar, where it appears that the interstate fares fixed by the Commission have been accepted as reasonable intrastate fares by 44 out of 48 states of the Union. In the language of the *Louisiana case, supra,* there is nothing in the conditions prevailing in the other four states 'so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable'."

That line of reasoning is founded upon two erroneous concepts.

The *Louisiana Case, United States* v. *Louisiana,* 290 U. S. 70, 54 S. Ct. 28, was a *general revenue case.* The federal Commission, in the *Fifteen Per Cent Case* had permitted general horizontal increases in rates in the form of "surcharges", in order to provide much needed revenue to the transportation system generally. The Commission there was acting under Section 15 (a) (2) of the Act—the "revenue need" Section. In a Section 13 proceeding the federal Commission ordered a horizontal increase in the Louisiana intrastate rates on the same percentages as interstate rates, whatever they were. There was no inquiry into the measure of any particular rate on any particular road in any particular region. This Court recognized that in a *general revenue* case under section 15 (a) (2) the Commission necessarily had to "deal with the carriers of the nation as a whole or in broad classes." The Supreme Court upheld the order of the federal Commission, clearly distinguishing the principles applicable in that general revenue case from those ap-

plicable in particular rate cases, such as the *Florida Case* 282 U. S. at page 211.

The District Court, unmindful of that distinction, unmindful of the fact that the North Carolina fare of 1.5 cents had been found "not unreasonable" for coach travel in the south, unmindful that that fare, then applied on intra and interstate traffic had already been increased by 10 per cent under the general-revenue case, Ex Parte 148, unmindful—that the fare of 1.65 cents had been found to be "just and reasonable for the future," based its conclusions upon the erroneous hypothesis that these four State coach fare cases were *general-revenue* cases also, like the *Louisiana Case.*

The District Court formed its conclusions upon the theory that the federal Commission had the power in this case to require "uniformity" for the sake of uniformity alone, even when the railroads, upon whom the burden of proof rested, failed to aduce any evidence before the Commission as to the intrinsic unreasonable lowness of the intrastate coach fare of 1.65.

The second erroneous concept of the District Court's line of reasoning is that all persons in the United States who travel in coaches other than pullmans or parlor cars, pay the same uniform fare of 2.2 cents per mile; and that the order of the federal Commission in the *1936 Fares Case* simply made the *one* fare the *uniform* coach fare throughout the nation. In our Statement of the Case we have shown that no such absolute uniformity exists.

The ordinary coach fares on numerous lines of railroad differ ranging up to as high as 5 and 6 cents per mile. Even in the south, from the year 1932, different ordinary coach fares have been in effect on different lines of railroads in in different portions of that region. Different types of coach fares have been in effect in different states. A different basic coach fare was approved for the south than that prescribed for the East and West. In certain states and

regions extra fares have been charged for travel on special types of trains and "extra fare" trains. Commutation fares, much lower than the ordinary coach fares, have been in effect in many portions of the country, under varying conditions, with fares ranging from 0.6 cent to 1.6 cents per mile. Fare of 1.25 cents have been available to the members of the armed forces in uniform, nurses, etc. It is common knowledge that special round trip and excursion fares of various types under widely varying conditions have been common throughout the country. Even during the progress of the case before the North Carolina Commission, there were marked differences in the fares of different carriers even in North Carolina. The North Carolina Commission permitted the additional increase of 33.3 per cent to those weak lines which proved that they were in need of additional revenue for their passenger operations, such as the Clinchfield and the Norfolk Southern, even though they were earning more than a fair return upon their aggregate traffic (Pr. 28).

Thus the absolute nationwide uniformity in coach fares, which the District Court had in mind, did not then and does not now exist.

Prescribing for intrastate traffic a "uniform" rate of horizontal increases in charges for the general revenue purposes of section 15 (a) (2), as in the *Louisiana Case*, is a wholly different thing from the raising of an approved intrastate fare by an additional 33.3 per cent *after* the general increase of 10 per cent had already been applied; for one of the particular types of coach service on the lines of a few particular railroads in four states.

Thus, throughout the Opinion of the District Court it is clear that the District Court was unmindful of the difference between a *general revenue* case under section 15 (a) (2) and a particular intrastate fare case in a particular region on particular roads.

It is doubtful even if the federal Commission's Order in the Louisiana case—a general revenue case—would have

been sustained if the Commission had not attached a saving clause which specifically "saved the rights of interested parties to test the reasonableness of any *individual rate.*" (*Louisiana Case,* at page 79 (33)). The federal Commission gave no time or opportunity to the interested parties to test the reasonableness of the increase on October 1, 1942 of 33.3 per cent in the interstate coach fare on certain lines in certain states, over and above the general increase of 10 per cent which had been added under the general revenue case.

North Carolina asks that the Supreme Court hold that the District Court erred in upholding the federal Commission's order upon the theory that the federal Commission had the power to increase these particular fares by 33.3 per cent simply to bring about "uniformity." In supplemental Reports in Ex Parts 148 the federal Comission granted authority to depart from the ordinary basic passenger fares upon separate applications of various railroads in various parts of the country in particular cases: Does the saving clause save the railroads and offer no protection to the traveling public?

POINT IX. The evidence does not justify the exercise of federal powers over these intrastate fares.

The District Court erred in sustaining, and in itself applying, erroneous rules of law and principles which were applied by the federal Commission; and in failing and refusing to find that the federal Commission's ultimate findings are not supported by substantial evidence; and in failing and refusing to find that there is no evidence which justified the exercise of the federal authority over the intrastate coach fares. The District Court erred in failing and refusing to set aside the federal Commission's Order, and in denying the relief prayed for.

The railroads, in their case before the North Carolina Commission presented only a perfunctory sort of showing.

They offered no evidence of prejudice or discrimination, no evidence to show the relation of the proposed increased fare to the cost of the service, or even the expenses assignable to that particular kind of coach traffic, no evidence that the intrastate fare was non-compensatory or unreasonably low, and disavowing any "need of revenue" which would support a finding of unjust discrimination or burden on interstate commerce.

The North Carolina Utilities Commission relying upon the findings of the federal Commission in the *1936 Fares Case*, that the ordinary coach fare of 1.5 cents in the south was "not unreasonable or otherwise unlawful," and in the absence of any substantial evidence of the railroads, except that there had been a great increase in car-occupancy, particularly the non-reserved seat coaches, which must have affected a great reduction in the expense per coach passenger mile, withheld its approval of the increase proposed by four opulent, war-rich railroads, and granted the increase to financially weak roads. It filed a petition with the federal Commission asking that it investigate the reasonableness of the *interstate* coach fares.

The federal Commission refused to do so. It issued its Hasty Order approving the additional increase of 33.3% over and above the general increase of 10% under Ex Parte 148, and did so without any hearing, or report or findings. It gave the public no opportunity to be heard.

The federal Commission, after a hearing before it, in which there was no proof that the intrastate coach fare was non-compensatory, or unreasonably low, no specific proof to show the relation between the proposed fare and the expense per coach passenger mile, no direct evidence or prejudice against interstate travelers, and in spite of the proof that the railroads were earning more profits from passenger than from freight traffic, and were earning exorbitant rates of return on investment, issued its order requiring the railroads to increase their intrastate coach fares to 2.2 cents, as a minimum reasonable intrastate fare.

Under these circumstances the federal Commission's actions, viewed in their entirety, constituted an abuse of power.

Commissioner Splawn (and he should know) said that (258 I. C. C. 160), Par. 102:

> "In my judgment the evidence in these proceedings falls far short of establishing that the failure of respondents to receive the additional revenue, which would result from increasing the present intrastate fares to the interstate level, operates to *interfere* with or to *thwart* the broad purpose of section 15a to maintain an efficient transportation system. Nor can it be said that under present conditions the failure of the State Commissions to permit increases in the present intrastate fares constitutes an obstruction to interstate commerce . . .
>
> "I wish to emphasize my disagreement with finding 5 in this report that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues *required* to enable respondents to render adequate and efficient transportation service. There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight considered as a whole.
>
> "The evidence in these proceedings does not sustain the contention that the maximum fares for interstate travel must also be the minimum fares for intrastate travel."

His separate expressions clearly point to the weaknesses in the ultimate findings of the Commission; and show that there was no occasion here for the intrusion of the federal authority into the realm of regulation which was reserved to the states by the Constitution.

Nowhere does it *clearly appear* that the exercise of the federal power over the intrastate coach fares was justified (Florida Case); or is necessary to make effective some

regulation of interstate commerce. (Illinois Case, 318 U. S. 675, 684.)

No one complained of them. There was no evidence to support the finding of prejudice between persons. (The *Barrett Case.*)

Nowhere is there any showing that the intrastate fares *interfered with or thwarted* the broad purpose of section 15 (a) (2).

The excessive rates of return and extremely low passenger operating ratios conclusively negative any finding that these roads "need revenue" and hence there is no foundation for the finding of unjust discrimination.

The authority to determine the reasonableness per se of the intrastate fares lay with the state Commissions. (The Florida Case.)

The presumption—a rebuttable one—was that the fares, held in effect by the state Commissions, were just and reasonable. (*Northern P. R. Co.* v. *North Dakota ex rel. McCue,* 236 U. S. 585.)

The federal Commission had no authority to raise an intrastate fare above a reasonable level. (*Louisiana Case.*)

The coach fare prescribed is, under existing conditions, so patently high as to be extortionate.

The federal Commission acted arbitrarily in seven separate incidents, the effect of which, in their entirety, was to deny to North Carolina the full hearing to which it was entitled under the statute.

The federal Commission exercised the federal power in such an unreasonable manner as to cause its order to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. (*Interstate Com. Com.* v. *Union P. R. Co.,* 222 U. S. 541.)

The decision of the District Court should be reversed and the Order of the federal Commission should be set aside.

STATE OF NORTH CAROLINA,
NORTH CAROLINA UTILITIES COMMISSION,
CHARLOTTE SHIPPERS' AND MANUFACTURERS' ASSO.,
NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, and
B. F. RUSSELL.

J. C. B. EHRINGHAUS
and
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Attorneys.

Dated at Raleigh, N. C.,
March 10, 1945.

APPENDIX A.

Relevant Parts of Statutes Cited or Relied Upon.

SECTION 3(1).
U. S. Code, Title 49, Sec. ((1).

It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SECTION 13(1).
U. S. Code, Title 49, Sec. 13(1).

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission *by petition,* which shall briefly state the facts; . . .

SECTION 13(2).
U. S. Code, Title 49, Sec. 13(2).

Said Commission *shall,* in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission. . . .

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. . . .

SECTION 13(3).
U. S. Code, Title 49, Sec. 13(3).

Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal Control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

SECTION 13(4).
U. S. Code, Title 49, Sec. 13(4).

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage,

preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15(1).
U. S. Code, Title 49, Sec. 15(1).

That whenever, after *full hearing*, upon a complaint made as provided in section 13 of this part, or after *full hearing* under an order or investigation and hearing made by the Commission on its own initiative . . .

SECTION 15(7).
U. S. Code, Title 49, Sec. 15(7), 44 Stat. L. 1447.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulations or practice and pending such hearing and decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding intiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge

for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date of this amendatory provision takes effect, *the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable*, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SECTION 15a(2).
U. S. Code, Title 49, Sec. 15a(2).

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.